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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROBERT W. RITCHIE, personally and in his representative capacity as partner/officer of Ritchie, Fels & Dillard, P.C.,
Petitioner,
and
JOHN DOE I, JOHN DOE II, JOHN DOE III,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR CERTIORARI

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20 copies

QUESTION PRESENTED

May the IRS enforce a summons against a law firm compelling disclosure of client identification and other confidences, despite a finding that "the IRS did not intend to investigate the summoned attorney", had misrepresented same to the Court, and failed to comply with the requisites of IRS Code §7609(f) and this Court's opinion in *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 105 S.Ct. 725, 83 L.Ed.2d 678 (1985)?

May the IRS compel a lawyer to disclose his client's identity and other information on IRS Form 8300, despite State Bar Rules and Local Rules of Federal Court forbidding and threatening disciplinary action for the revelation of such information?

PARTIES TO THE PROCEEDING

The Parties to this proceeding are listed in the style of this case.

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No_____

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ROBERT W. RITCHIE, personally and in his representative capacity as partner/officer of Ritchie, Fels & Dillard, P.C.,

Petitioner

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JOHN DOE I, JOHN DOE II, JOHN DOE III,

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UNITED STATES OF AMERICA

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR CERTIORARI

The Petitioner Robert W. Ritchie respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above proceeding on February 3, 1994.

REFERENCE TO OPINIONS IN THE CASE

The judgement and opinion of the Sixth Circuit Court of Appeals is reported at ***U.S. v. Ritchie***, 15 F.3d 592 (6th Cir. 1994) at page 1a of the Appendix hereto. The opinion of the District Court is ***U.S. v. Ritchie***, ____ F. Supp. ____, No. Civ-3-92-610 (E.D. Tenn. September 11, 1992), at page

22a of the Appendix hereto. A District Court opinion was issued in a pre-enforcement proceeding at ***Doe v. U.S.***, 777 F. Supp. 590 (E.D. Tenn. May 23, 1991), at page 28a of the Appendix hereto.

GROUNDS FOR JURISDICTION

This Court has jurisdiction to issue a writ of certiorari in this case under 28 U.S.C. § 1254.

STATEMENT OF THE CASE WITH BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

This petition seeks review of the Sixth Circuit's affirmance of a final order granting the Government's motion to enforce an Internal Revenue summons. The District Court had jurisdiction pursuant to 26 U.S.C. § 7604. The Sixth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 which authorizes appeals from the final order of a district Court.

The Government instituted a petition to enforce an Internal Revenue Service summons on January 15, 1992. (R.1, Entry 1). The case was originally numbered Misc. 92/2015 in the United States District Court for the Eastern District of Tennessee. Petitioner Robert W. Ritchie timely filed an Answer denying that the Internal Revenue Service was entitled to enforcement. (R.2, Entry 7: Answer). The trial Court held a hearing and took evidence on the issues on August 31, 1992. (R.2: Transcript of Hearing). Also on August 31, 1992, the case was renumbered CIV-3-92-610 in the district court and the Record Entries were transferred. (R.1). On September 11, 1992, the trial Court entered an order treating the petition for enforcement as if the government had proceeded under 26 U.S.C. §7609 and granting enforcement. (R.3: Order). Mr. Ritchie filed a timely notice of appeal. (R.6: Notice of Appeal).

Robert W. Ritchie is a well known member of the Knoxville, Tennessee Bar. He specializes in the defense of criminal cases, although he and his firm handle civil matters as well. Mr. Ritchie formerly served as the President of the Knoxville Bar Association and the National Association of Criminal Defense Lawyers. (R. 2: Excerpt of Proceedings at 4).

On March 16, 1990, the Internal Revenue Service (IRS) issued a summons to the Petitioner, Robert W. Ritchie, directing him to appear at the Internal Revenue Office in Knoxville on April 6, 1990 (R.1, Entry 1: petition to Enforce Summons, Ex. A-1) and to produce certain records relating to his representation of several of his cash paying clients. The IRS primarily sought to discover the identities of clients omitted from IRS Forms 8300 [See: 26 U.S.C. §6050I] filed by the law firm attempting to accommodate the requirements of both the IRS and professional ethics. The IRS did not seek, and was not granted, judicial authorization for the summons prior to serving it upon Mr. Ritchie.

The IRS only knew that Mr. Ritchie represented the individuals whose identity it sought as a result of Forms 8300 which Mr. Ritchie had filed, acknowledging that he had received cash payments in excess of $10,000 for legal representation. At the time Mr. Ritchie filed the 8300 forms in question, §6050I of the Internal Revenue Code, implemented through Form 8300, required the recipient of cash greater than $10,000 in his trade or business to provide the IRS with notice of the transaction. The form provided for disclosure of the amount received, the purpose for the transaction, the services provided, the amount in $100 dollar bills, and fairly detailed information regarding the organization or business from whom the money was received.

Mr. Ritchie filed the form completed in full with the exception of information relating to the identity and

circumstances of his clients. (R.1, Entry 1: Petition to Enforce IRS Summons, Ex. A-2). By letter attached to the Form 8300, Mr. Ritchie informed the IRS that he was legally and ethically precluded from furnishing client identifying information by the attorney-client privilege, the Fifth and Sixth Amendments to the United States Constitution, and the Tennessee Code of Professional Responsibility.

Because of Mr. Ritchie's professional and constitutional obligations, he likewise declined to produce the documents requested by the summons.

IRS FORMS AND SUMMONS REQUIRE MORE THAN JUST CLIENT'S IDENTITY

Like the Form 8300, the IRS summons sought to compel Mr. Ritchie to provide all his records concerning the following:

> "The complete names, addresses, business or occupations and social security or taxpayer identification numbers of any and all clients (whether individuals and/or organizations) for whom the transactions reported were completed.
>
> Any other identifying data for the individuals or organizations who conducted the transactions or for whom the transactions were conducted.
>
> The general nature of the transaction reported on the attached Forms 8300, ***with a description of the services involved.***" (R.1, Entry 1: Petition to Enforce IRS Summons, Ex. A-1).

Form 8300 now additionally requests the filing party to state whether the payment by one's own client constituted a "suspicious transaction".

On January 15, 1992, the United States filed a Petition to Enforce Internal Revenue Service Summons in Federal District Court for the Eastern District of Tennessee. (R.1, Entry 1). On August 31, 1992 the Honorable Thomas Hull, District Judge, heard testimony regarding whether the summons should be enforced. (R.2: Transcript of Proceedings and Excerpt of Proceedings).

One of the issues developed by the pleading and at the hearing centered around the IRS's true purpose for requesting this information. The Petitioner, his law firm, and the intervening clients contended that the sole purpose of the IRS summons was to gather information to use in criminal prosecutions against clients of Mr. Ritchie's law firm. (R.1, Entry 8: Respondent's Memorandum of Law). Petitioner argued that, in addition to the constitutional prohibitions against compelled disclosure of such client information, the IRS was required to follow the procedures specifically required by Internal Revenue Code §7609 (f) when seeking records from a third party regarding an unnamed taxpayer.

However, the government's petition and the sworn affidavit filed by IRS Agent Rhonda Winter alleged that the sole purpose of the investigation was to determine the tax liability of the law firm. (R.1, Entry 1).

At the hearing, the Petitioner offered testimony from Mr. Ritchie and his partner Charles Fels. Both testified that Internal Revenue Agent Rhonda Winter, who had personally served the summons, had assured them at that time that the IRS was not investigating the law firm. Rather, she told them, the information sought only related to the unnamed clients of the firm. (R.2: Excerpt of Proceedings at 6-12).

The Petitioner also introduced an article by the Commissioner of the Internal Revenue Service published nationally in ***USA Today*** on March 13, 1990, three days before the IRS served Mr. Ritchie with the summons. In the article the Commissioner stated that the IRS was using the

8300 forms to get information about criminal suspects from their attorneys. (R.2: Ex. D-1: Commissioner Goldberg article).

The government offered no testimony from Agent Winter[1], although she was present at the hearing. The government instead chose to rest on the affidavit of Agent Winter that had been attached to the petition, which asserted that the information requested would be relevant:

> "(1) to determine the compliance by Ritchie, Fels & Dillard, P.C. with the reporting requirements of Section 6050-I of the Code; (2) ascertain the correctness of the forms 8300 ...; and (3) determine the liability, if any, of Ritchie, Fels & Dillard, P.C., for penalties imposed pursuant to § 6721 through § 6723 of the Code." (R.1, Entry 1: Petition to Enforce IRS Summons, Ex. A).

In other words, the government contended that it's purpose was not to gather information to use in criminal prosecution of the firm's clients, rather to investigate the firm itself.

MISREPRESENTED INTENTIONS

After hearing all the evidence, the District Court entered an order setting out its findings of fact and conclusions of law. (R.3: Order). The District Court explicitly found as fact that "the IRS [was] not conducting an investigation into the correctness of Forms 8300 filed by Ritchie, Fels & Dillard P.C.," rather "the IRS [was] making

---

[1] Petitioner introduced affidavits prepared by IRS agents in other summons enforcement cases which established that Ms. Winter's affidavit was simply a form used in all such enforcement actions. (R.1, Entry 8: Respondent's Memorandum, Exhibit A).

a general search for the identities of cash paying clients". Finding not only that the IRS had misrepresented its intentions, but that the summons constituted a "John Doe" request and therefore was subject to the strictures and requirements of §7609(f)[2] which the IRS had concededly not followed.

> "In light of the very credible evidence offered by the [Petitioner], the Court FINDS that, in the instant case, the IRS is not conducting an investigation into the correctness of Forms 8300 filed by Ritchie, Fels & Dillard, P.C., nor is it investigating the firm's liability for penalties imposed by Sections 6721 through 6723 of the Code, as claimed. To the contrary, the IRS is making a general search for the identities of cash paying clients." ***U.S. v. Ritchie***, _____ F. Supp. ____, No. CIV-3-92-610 (E.D. Tenn. September 11, 1992) at page 22a to appendix hereto.

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[2] **(f) Additional requirement in the case of a John Doe summons.** Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that --

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained form the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available form other sources.

SEEKING ASSISTANCE OF WELL KNOWN CRIMINAL DEFENSE ATTORNEY IN CONFIDENCE FOUND SUSPICIOUS

Nevertheless, the District Court then found that, as a matter of law, the government would be excused from satisfying the procedural requirements of §7609(f), holding that the facts that these unnamed clients were "seeking legal assistance from a well known criminal defense attorney", paid in cash and wanted to keep same confidential was sufficient "reasonable basis" to believe such persons violated the IRS code. In particular, the district court found the 7609 requirements for obtaining the John Doe client records had been satisfied by the following:

1. The requirement that the summons relate to a particular person or group was satisfied by showing that they were clients who paid Mr. Ritchie in cash.

2. The requirement that there is a reasonable basis for believing that such person or group may have violated internal revenue laws was satisfied by a showing that (a) they were seeking legal assistance from a well known criminal defense attorney, (b) they sought to keep their identities secret, and (c) they do business with large amounts of cash.

3. The court held that it was obvious that the third requirement that the information not be readily available elsewhere was satisfied. ***U.S. v. Ritchie***, _____ F. Supp. ____, No. CIV-3-92-610 (E.D. Tenn. September 11, 1992) at page 22a appendix hereto.

Acknowledging that the District Court failed to consider the fact 26 U.S.C. §7609(f) dictates that a "John Doe summons may be ***served 'only after*** a court proceeding in which the Secretary establishes [three enumerated elements]'", the Sixth Circuit, nevertheless refused to follow

this Court's clear precedent in ***Tiffany Fine Arts, Inc. v. U.S.***, 469 U.S. 310, 322, 105 S.Ct. 725, 731, 83 L.Ed.2d 678 (1985) and ***U.S. v. Powell***, 379 U.S. 48, 57-58, 85 S.Ct. 248, 254-55, 13 L.Ed.2d 112 (1964). Instead, the Court of Appeals held that it would not require the IRS to follow the mandated statutory procedure in this case. Even though the Sixth Circuit adopted the District Court's findings of fact, specifically that the IRS had misstated its purpose in seeking the summons in its affidavit in support of its Petition to Enforce IRS Summons, the Court decided that, prior judicial approval of the issuance of John Doe summons would not be required here.

The Court of Appeals rejected the first two of the District Court's reasons for ignoring the explicit and mandatory statutory prerequisites, holding:

> "While statistically speaking there may be a high correlation between acting in secret to consult well-known criminal defense counsel and being guilty of internal revenue violations, we doubt this is a constitutionally permissible inference. Our legal system requires that the innocent and the guilty alike be permitted to consult counsel on legal matters without attaching penalty to the exercise of that right. To allow such consultation to be used as the basis for creating a class of suspected tax law violators is to unduly burden the right to consult one's attorney." ***U.S. v. Ritchie***, 15 F.3d 592 (6th Cir. 1994).

Instead the Sixth Circuit approved the IRS's actions in this case by noting that the fact that the clients paid in cash alone was sufficient to raise a reasonable suspicion. ***U.S. v. Ritchie***, 15 F.3d 592, 601 (6th Cir. 1994).[3]

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[3] However, neither 6050I nor the reporting requirements of Form 8300 are in any way limited to reporting transactions involving "large amounts of cash". 26 U.S.C. §6050I now also requires that receipt of

NO LONGER JUST CASH

What the Sixth Circuit did not address was the Hobson's choice this leaves counsel: either to violate his or her obligation to keep client confidences and risk discipline, disbarment, and the prospect of criminal sanctions in Tennessee, or abide by the obligation to keep client confidences by omitting client names from Form 8300 and risk substantial fines and other sanctions.

"money orders", "bank drafts", "travelers checks", and "cashier's checks" likewise be reported in certain "designated reporting transactions", not including the provision of legal services.
Specifically, the instructions at page 3 of Form 8300 [at appendix page 54a], expressly provide:

> "Changes You Should Note
>
> Section 6050I of the Internal Revenue Code was revised by the Revenue Act of 1990 to provide that, to the extent provided by the regulations, the term 'cash' includes any monetary instrument, whether or not in bearer form, with a face amount of not more than $10,000 (other than certain checks)....effective 02/03/92...
>
> **Cash--Amounts received on or after 02/03/92.**-- The term cash means, in addition to the above definition, a cashier's check, bank draft, traveler's check, or money order having a face amount of not more than $10,000...." Form 8300, Instructions at p.3, at appendix page 54a. Congress has not addressed the special ethical considerations facing attorneys who represent those accused of criminal offenses.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's opinion, enforcing an IRS summons against an attorney for the identity of clients and other information required on IRS Form 8300, despite a finding that "the IRS did not intend to investigate the summoned attorney," and in fact had misrepresented same, conflicts with this Court's decision in ***Tiffany Fine Arts, Inc. v. U.S.***, 469 U.S. 320, 322 (1985).

Moreover, State Bar Associations across the country have condemned the compelled disclosure of such client confidences, issuing opinions and passing resolutions threatening to discipline lawyers for providing this information on IRS Forms 8300. The IRS has begun an orchestrated and well-publicized campaign to assess massive monetary penalties against honest, ethical lawyers who are attempting both to comply with 6050I and abide by their Code of Professional Responsibility and decline to record their clients' identity and other information on IRS Form 8300 without prior court order. The organized bar across the country is entitled to resolution of this ongoing and increasingly heated dispute.

As a result of the Sixth Circuit opinion below, the Court of Appeals has placed its implicit stamp of permiture upon Government perjury regarding its enforcement of IRS Tax Code provisions[4], while that same government agency,

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[4] The Trial Court's finding (adopted by the Sixth Circuit) was clear:

> "...Judge Hull found that the IRS has proceeded as if the law firm were the actual target of its investigation, but that in actuality the IRS was not concerned with the firm's tax liability, but only with the identity of the clients who made the cash payments." *U.S. v. Ritchie*, 15 F.3d 592, 599 (6th Cir. 1994).

This, despite the fact that "[i]n her affidavit before the court, Revenue Agent Winter swore that she was conducting an investigation to

utilizing these same statutes, now seeks to punish honest, ethical lawyers to the tune of at least $25,000 every time

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ascertain the correctness of Forms 8300 filed by Ritchie, Fels & Dillard, P.C. pursuant to the provisions of Section 6050I of the Code [and]...investigating the liability, if any, of Ritchie, Fels & Dillard, P.C., for penalties imposed by Sections 6721 through 6723 of the Code". ***U.S. v. Ritchie***, 15 F.3d 592, 599 n. 6 (6th Cir. 1994). A position the Trial Court found to be false.

The District Court found that the Government agent did "***not*** claim that her primary ***or even secondary purpose*** is to identify the firm's cash paying clients to investigate their tax liability", (emphasis supplied) ***U.S. v. Ritchie***, ____ F. Supp. _____, No. CIV-3-92-610, slip op. at 2-3 (E.D. Tenn. September 11, 1992):

> "The petition is supported by the affidavit of Revenue Agent Rhonda Winter who claims she is conducting an investigation into the correctness of Forms 8300 filed by the Ritchie firm; the firm's potential tax liability under Sections 6721 and 6723; and the firm's liability, if any, for penalties imposed by Sections 6721 through 6723 of the Code. Agent Winter does not claim that her primary or even secondary purpose is to identify the firm's cash paying clients to investigate their tax liabilities."

However, the District Court expressly and specifically found that contrary to the sworn affidavit and pleading of the Government, the IRS was doing precisely what it swore to the Court it was not doing.

> "In light of the very credible evidence offered by the respondent [law firm], the Court FINDS that, in the instant case, the IRS is ***not*** conducting an investigation into the correctness of Forms 8300 filed by Ritchie, Fels & Dillard, P.C., nor is it investigating the firm's liability for penalties imposed by Sections 6721 through 6723 of the Code, as claimed. To the contrary, the IRS is making a general search for the identities of cash-paying clients." ***U.S. v. Ritchie***, ____ F. Supp. ____, No. CIV-3-92-610, slip op. at p. 7 (E.D. Tenn. September 11, 1992).

they attempt to follow their State Bar's Canons of Ethics. See: Official IRS Press Release, dated December 7, 1993, attached at Appendix page 65a, and compare footnote 3, herein.

SKYROCKETING COST OF LEGAL ETHICS

The Sixth Circuit's opinion makes clear that where, as here, the IRS "cannot demonstrate a bona fide interest in investigating the tax liability" of a subpoenaed law firm, "in the future" the IRS, "must comply with §7609(f)" requiring the IRS satisfy a Court that a summons should issue. ***U.S. v. Ritchie***, 15 F.3d 592, 600 (6th Cir. 1994).

> "We are not suggesting that the IRS may in the future avoid going through the ex parte proceeding required by §7609(f), for now the IRS has fair notice that if it cannot demonstrate a bona fide interest in investigating the tax liability of the party summoned [the law firm], it must comply with §7609(f)." ***U.S. v. Ritchie***, 15 F.3d 592, 600 (6th Cir. 1994).

Yet, based upon the same authorities relied upon by the Sixth Circuit[5], the IRS has begun an orchestrated and

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[5] In fact, the IRS now seeks to utilize the very Sixth Circuit opinion in this case to justify the assessment of severe civil penalties for "intentional disregard" of 26 U.S.C. §6050I's requirements, without benefit or even any mention of that Court's admonition that:

> "We are not suggesting that the IRS may in the future avoid going through the ex parte proceeding required by §7609(f), for now the IRS has fair notice that if it cannot demonstrate a bona fide interest in investigating the tax liability of the party summoned [the law firm], it must comply with §7609(f)." ***U.S. v. Ritchie***, 15 F.3d 592, 601 (6th Cir. 1994).

See: Letter from IRS Assistant Chief Counsel, dated February 23, 1994,

well-publicized campaign to assess massive monetary penalties against lawyers who follow their State Bar Code of Ethics and decline to reveal their client's identity and other information on IRS Form 8300 without a prior court order. See: Official IRS Press Release, dated December 7, 1993, and attached at appendix page 65a.

Several State Bar Associations have indicated that attorneys violating such Codes of Professional Responsibility face discipline and even disbarment for same. See: State Bar Association Opinions from some ten different states, at appendix pp. 72a-164a.[6]

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and attached at appendix page 65a.

[6] **Florida** (December 1993 Florida Bar Professional Ethic Committee Advisory Opinion No. 92-5), **Washington** (1991 State Bar Association Ethics Opinion No. 189), **Ohio** (April 1990 State Board of Commissioners on Grievances and Discipline Opinion No. 90-04), **District of Columbia** (September 1990 Opinion No. 214 and March 1983 Bar Ethics Committee Opinion No. 124), **Illinois** (May 1988 Bar Association Ethics Opinion No. 86-2), and **Georgia** (September 1984 State Bar Advisory Opinion No. 41) consider release of client confidences by furnishing the information required by section 6050I sanctionable.

New York (January 1990 State Bar Resolution, and April 16,1994 State Bar Resolution), **New Mexico** (December 1989 State Bar Advisory Opinion No. 1989-2), **Arizona** (January 1987 State Bar Ethics Opinion No. 87-3), **Pennsylvania** (1990 Bar Association Ethics Opinion 89-141), **Wisconsin** (April 1990 State Bar Opinion E-90-3), **Alabama** (March 1986 Ethics Opinion No.86-19), and **Kentucky** (September 1981 Legal Ethics Opinion E-253) recognize that the problem between the requirements of 6050I and maintaining client confidences exists, and every state sanctions disclosure of attorney client privileged information. See Appendix at pp.72a-164a.

Likewise the ABA Model Rules of Professional Conduct, Model Rule 1.6 and the ABA Model Code of Professional Responsibility, DR4-101 prohibit the disclosure of client confidences. Responding to the conundrum addressed by the ABA and the State bars which attorneys face, Congressman Kopetski has proposed a bill that would exempt

CODES OF PROFESSIONAL RESPONSIBILITY ADOPTED AS FEDERAL COURT RULES

According to the Federal Judicial Center, the local rules for the majority of the Unites States District Courts incorporate or adopt their respective State Bar Codes of Professional Responsibility as ethical standards for attorneys practicing before those Federal courts[7]. This Court has held that such Federal Court local rules are the "law of the United States. ***U.S v. Hvass***, 355 U.S. 570, 78 S.Ct. 501 (1958) [within the meaning of the perjury statute]; ***Wirtz v. Hooper-Holmes Bureau, Inc.*** 327 F.2d 939 (5th Cir. 1964); ***Paul E. Iacono Structural Engineer, Inc.v. Humphrey***, 727 F.2d 435, 438 (9th Cir. 1983)["...the district court has primary responsibility for controlling the conduct of attorneys practicing before it]; ***U.S. v. Klubock***, 832 F.2d 664 (1st Cir. 1987) [evenly divided ***en banc***]. ***See also U.S. v. Hammad***, 858 F2d 834 (2d Cir. 1988), and ***U.S. v. Lopez***, 4. F.3d 1455 (9th Cir. 1993) [both holding that DR7-104(A)(1)(addressing the propriety of counsel's communication with an individual represented by counsel)was enforceable against federal prosecutors through adoption in the federal district court's local rules].

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attorneys from the reporting requirement. See: Appendix at p. 165a.

More to the point, Tennessee Ethics Advisory Opinion 90-A-414 sanctions the release of information required by section 6050I without a court order, and Rule 4.1 of the of the Federal Local Rules for the United States District Courts for the Eastern District of Tennessee adopts the Tennessee Code of Professional Conduct as the official Code of Conduct for that Court.

[7] Here the local rules of the United States District Court for the Eastern District of Tennessee expressly adopts the "Rules of Professional Conduct adopted by the Supreme Court of Tennessee as its code of professional conduct." Local rule 83.6 of the United States District Court for Eastern District of Tennessee. Local rule 83.7(a) empowers the District court to impose discipline based upon violations of same.[at appendix p.168a.]

The Sixth Circuit likens criminal defense lawyers to jewelers and used car dealers, noting that:

> "We must conclude that there is no reason to grant law firms a potential monopoly on money laundering simply because their services are personal and confidential; other businesses must divulge the identity of their cash-paying clients in keeping with lawful revenue regulations and law firms should not be an exception to this rule." ***U.S. v. Ritchie***, 15 F.3d 592, 601 (6th Cir. 1994).

However, there is no constitutional right to a Rolex or a Mercedes, and more importantly, the Sixth Circuit opinion fails even to address the very difficult ethical quandary these lawyers are now left to face[8].

Courts that have addressed the propriety of withholding such information absent a court order compelling disclosure have approved the lawyer's insistence

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[8] Although reaching the question, the Sixth Circuit suggested that while "Ritchie argued below that disclosure of this information would violate the ***attorney-client privilege***, [h]e apparently abandoned this argument on appeal," ***U.S. v. Ritchie***, 15 F.3d 592, 602 (6th Cir. 1994), noting that he did "not argue same." ***U.S. v. Ritchie***, 15 F.3d 592, 602 n.12 (6th Cir. 1994). However inartfully same may have been accomplished, Petitioner Ritchie makes repeated reference in his Brief on appeal to the fact that "he was legally and ethically precluded from furnishing client information by the attorney-client privilege, the Fifth and Sixth Amendments to the United States Constitution, and the ***Tennessee Code of Professional Responsibility***." (emphasis supplied) Brief of Respondent-Appellant, at pp.3 and 23. The Government responded to both the "privilege" and "ethical code" arguments at length without objection, See: Government's Brief for the Appellee, at pp.44-9, and counsel argued same before the Court of Appeals for the Sixth Circuit without complaint. We therefore do not understand the claim of abandonment.

on a court's resolution of the privilege issue. The Second Circuit in ***U.S. v. Goldberger & Dubin, P.C.***, 935 F.2d 501 (2d Cir. 1991), affirmed the district court ***sub nom*** in ***U.S. v. Fischetti, Pomerantz & Russo***, Cause No. M-18-304 (S.D. N.Y. March 13, 1990)[at appendix 169a], where Judge Broderick announced in his decision that:

> "I ... grant the application that I include in my disposition a statement indicating that the respondents have conducted themselves ethnically (sic) and responsibly in attempting to obtain a judicial ruling about their responsibilities under 26 U.S.C. 6050I, and I want to just elaborate on that for just a minute.
>
> The documents that have been submitted to me spell out an almost constant effort by various elements of the defense bar to cope with the responsibilities which 26 U.S.C. 6050I have placed upon defense counsel, criminal defense counsel.
>
> There have been interpretations by various ethics committees of bar associations, including the American Bar Association, to officials of the Department of Justice and of the Internal Revenue Service, all of which have dealt precisely with the problems that have been discussed at this hearing this morning.
>
> The problems that the respondent law firms were wrestling with are, therefore, problems which have been faced by many, many criminal law practitioners, and it is certainly clear to me, maybe the only thing clear in this case, is that the respondents here have taken a responsible position."

In ***U.S. v. Leventhal***, 961 F.2d 936 (11th Cir. 1992), the Eleventh Circuit affirmed the district court, which held that:

> "Respondents correctly declined to answer on account of attorney-client privilege without direction of the court. The attorney-client privilege protects confidential communications." ***U.S. v. Leventhal***, Cause No. 91-41-MISC-ORL-18 (M.D. Fla. March 12, 1991)[appendix at p. 17a].

VERY RECENT WHITE HORSE CASE

Recently addressing this very issue on very similar facts, the United States District Court for the District of Kansas refused to enforce just such an IRS summons served upon an attorney, referring the matter instead to the "Chairman of the Federal Court Committee on Attorney Conduct" of that District, noting:

> "Given the foregoing, it would appear that the court's prerogatives are clear. The lawyer is not excluded from compliance with the Act and somehow the identity of his client is not protected and he must comply.
>
> The problem here is with the court's own perceptions as to what is expected of the attorney in the exercise of his professional role. In the court's view, this Act, these decisions, and the reasoning therefore fly in the face of what an attorney's role is all about. The attorney is not expected to confer with a client as in a commercial venture. The client's role is more than that; indeed, it is more than even a fiduciary relationship in its highest mode. It is a relationship different from any other in our society, save for the confessor or physician. In the court's view,

> it is a sacred trust and should not be intruded in. In this regard, it seems that lawyers, unlike any others, are duty-bound to preserve that trust, as they, unlike others, are bound by canons of ethics geared to preservation of that trust. Given such perceptions, this court is troubled with these decisions. The attorney's ethical responsibilities are at risk. It is clear to this court that if and when a client consults with an attorney, retaining him for whatever purpose, the canons mandate that the client's very identity must be preserved. In saying this, the court appreciates that under Rule 1.6 a lawyer may reveal such information to the extent the lawyer reasonably believes necessary to comply with requirements of law. Rule 1.6(b)(2). In the court's view, it follows that if the client is once informed that his payment of a cash fee to the attorney in an amount in excess of $10,000.00 automatically puts in place his public identity, then only the client, not the lawyer, must consent. The court is informed that in this instance the client did not consent. ***In the face of this, to proceed otherwise, in compliance with the Act, may well submit the attorney to an unethical act. U.S. v. Monnat***, ___ F.Supp. ____, Slip Op., No. 93-1326-PFK (D. Kan. January 13, 1994).

In this instance, this attorney was advised by his own attorney that such act would be unethical.

> Stated another way, it follows that if the lawyer ignores the client's refusal to consent, thus complying with the Act, he may find himself in the same situation as that in Cherney. Surely, the lawyer's compliance

may submit the client to an investigative process at the hands of the United States and even indictment, all as a consequence of the lawyer's revelations. In such a setting, while the lawyer has complied with the requisites of the Act, he has done so at quite a price. ***The court's perceptions may be misplaced, but the fact remains that the attorney's conduct and ethical ramifications are of paramount concern to him. This court is not alone. See: The Georgetown Journal of Legal Ethics, "Form 8300: The Demise of Law as a Profession,"*** Vol. V, No. 2, at 485. Further, the court is advised that Attorney General Reno has recently expressed her interest and concern about this matter. Thus, before proceeding further, this court elects to ...[refer this Opinion] to the Chairman of the Federal Court Committee on Attorney Conduct with a request for that committee to undertake a study of the issues in this case, taking into account the court's comments noted herein. ...fully review[ing] the ethical ramifications...[and to] report [to the court] within 120 days". (emphasis supplied) ***U.S. v. Monnat***, __F.Supp.__, Slip Op. No. 93-1326-PFK (D.Kan. January 13, 1994).[9]

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[9] The controversy became moot in ***U.S. v. Monnat***, __F.Supp.__, Slip Op. No. 93-1326-PFK (D.Kan. January 13, 1994) at a time when that Federal Court's Committee on Attorney Conduct was submitting its report for comments. Even though the report was not finalized, it did state that: "[w]hen an apparent conflict between Rule 1.6 and some other law cannot be satisfactorily mitigated or avoided, it is permissible to seek an interpretation of application of a law in good faith." ***U.S. v. Monnat***, ____ F. Supp. ___, Cause no. 93-1326-PFK (D. Kan. May 27, 1994). In fact, the lawyer "may well be obligated to take ... reasonable steps to

The remaining courts have enforced summonses without resolving the conflict between counsel's ethical obligations and the reporting requirement in 6050I. See: ***F.T.C. v. Cambridge Exchange, LTD., Inc.***, 845 F. Supp. 872 (S. D. Fla. 1993); ***In re Moffitt, Zwerling & Kemler, P.C.***, 846 F. Supp. 463 (E.D. Va. 1994); ***U.S. v. Sindel***, No. 4: 94MC10-DJS, 1994 W.L. 190027 (E.D. Mo. 1994).

HIRING A "WELL-KNOWN CRIMINAL DEFENSE ATTORNEY" AND WANTING TO KEEP SAME CONFIDENTIAL

PAYING FOR LEGAL SERVICES WITH LEGAL TENDER

The District Court held that there was a "reasonable basis" for believing that clients of Ritchie, Fels & Dillard, P.C. had "violated internal revenue laws" because "they were seeking legal assistance from a well known criminal defense attorney" in confidence, and paid with "large amounts of cash". While rejecting the District Court's reliance upon the fact that these clients "were seeking to consult a well-known criminal defense attorney" in "secret" as any basis for issuance of the summons on the grounds that same would be violative of those citizen's Sixth Amendment right to counsel[10], the Sixth Circuit nevertheless held that

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assert confidentiality and obtain a determination of whether the other law or rule 1.6 prevails." ***U.S. v. Monnat***, ____ F. Supp. ___, Cause no. 93-1326-PFK (D. Kan. May 27, 1994).

[10] The panel recognized that:

> "Our legal system requires that the innocent and the guilty alike be permitted to consult counsel on legal matters without attaching a penalty to the exercise of that right. To allow such consultation to be used as the basis for creating a class of suspected tax law violators

payment in "cash" did raise such reasonable suspicion:

> "We therefore hold that the simple fact that these clients paid for legal services with large amounts of cash is a sufficient 'reasonable basis' upon which to issue the John Doe summons." ***U.S. v. Ritchie***, 15 F.3d 592, (6th Cir. 1994).

This Court very recently noted that there is nothing inherently "nefarious" in a citizen utilizing cash or even structuring same so as to avoid IRS scrutiny. ***Ratzlaf v. U.S.***, __U.S.__, No.92-1196 (January 11, 1994).

> "[C]urrency structuring is not inevitably nefarious. Consider, for example, the small business operator who knows that reports filed under 31 U.S.C. §5313(a) are available to the Internal Revenue Service. To reduce the risk of an IRS audit, she brings $9,500 in cash to the bank twice each week, in lieu of transporting over $10,000 once each week." ***Ratzlaf v. U.S.***, __U.S.__, No.92-1196 (January 11, 1994).

This Court went on to note that people make "cash deposits in small amounts [in order to avoid the reporting requirements], fearful that the bank's reports would increase the likelihood of burglary, or in an endeavor to keep a former spouse unaware of his wealth."

> "Courts have noted 'many occasions' on which persons without violating any law, may

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is to unduly burden the right to consult one's attorney. For this reason we cannot approve the district court's reliance on these two factors." *U.S. v. Ritchie*, 15 F.3d 592 (6th Cir. 1994).

> structure [cash] transactions 'in order to avoid the impact of some regulation or tax.'" ***Ratzlaf v. U.S.***, __U.S.__, No.92-1196 (January 11, 1994).

Just as there are many legitimate reasons why an individual may desire to seek legal advice and representation in confidence:

> "Clients often consult with attorneys concerning matter that they wish to keep confidential. The matter may or may not involve misconduct, the client may or may not be implicated. For example, a client may wish to consult with an attorney concerning adopting a child but not wish the matter to be made public. Such an individual normally will reveal the nature of his problem as well as his identity, and reasonably expects both to remain confidential." ***In re Grand Jury Subpoena (Reyes- Requena)***, 926 F.2d 1423, 1431 (5th Cir. 1991).

Whether adopting a child, seeking legal advice and representation regarding one's spouse, or a feared but unfounded investigation of an elected official or judge, people should be able to seek legal counsel and representation without the fear that the very act of contacting and retaining counsel will be used against them. Otherwise we will undermine the very purpose of the attorney-client privilege: that of encouraging citizens to seek out and obtain competent ethical legal advise and representation.

FORM 8300 REQUIRES ATTORNEYS DISCLOSE MORE THAN JUST CLIENTS' IDENTITIES [REVEALING "SUSPICIONS" ABOUT ONE'S OWN CLIENTS]

Moreover, Form 8300 as well requires that the reporting individual provide the IRS with much more than simply the name of the client and the amount of the fee. Form 8300 now requires the reporting of the "***Occupation, profession, or business***" of both the person from whom the funds were received [Part I, para.8, of Form 8300, at appendix pp. 52a - 64a] and the person on whose behalf the funds were paid [Part II, para.25 of Form 8300, at appendix pp. 52a - 64a], the "***Specific description of...services purchased***" [Part III, para.32, at appendix pp. 52a - 64a], and a box to check when the payment constitutes a "***suspicious transaction***" [Box 1,b Form 8300, at appendix pp 52a - 53a]. Hardly innocuous information with respect to a criminal investigation of an attorney's client.[11]

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[11] "The Government would place a chilling consequence on the very act of obtaining legal advise"..."Clients often consult with attorneys concerning matter that they wish to keep confidential. The matter may or may not involve misconduct, the client may or may not be implicated. For example, a client may wish to consult with an attorney concerning adopting a child but not wish the matter to be made public. Such an individual normally will reveal the nature of his problem as well as his identity, and reasonably expects both to remain confidential." ***In re Grand Jury Subpoena (Reyes- Requena)***, 926 F.2d 1423, 1431 (5th Cir. 1991).

CANVASSING THE CRIMINAL BAR FOR INFORMATION DETRIMENTAL TO ITS CLIENTS

In a like vein the IRS has made clear its intent to "begin assessing the intentional disregard penalty against" attorneys "around the country" in the hopes of detecting illegal activity by "some of the customers and clients" of the law firms. See: Official IRS Press Release, dated December 7, 1993, at appendix p. 65a.

> "[T]he Internal Revenue Service announced today that it will begin assessing the intentional disregard penalty against certain attorneys. This is part of an on-going effort to enhance Form 8300 compliance by ***attorneys*** who either fail to file the form or file an incomplete one....
> IRS personnel around the country can use this information in their...criminal investigation work. The data helps detect nonfiling, unreported income, and money laundering often associated with narcotic trafficking and other illegal activities ***by some of the customers and clients*** of the businesses required to file." (emphasis supplied) Official IRS Press Release, dated December 7, 1993, at appendix p. 65a.

Such a "broad attempt to canvass...a generous portion of the criminal bar...for information detrimental to certain of its clients: that each had paid an attorney or attorneys amounts greater than his reported gross income during the year of payment" has been condemned by the Courts,

irrespective of any "last link" analysis. ***In Re Grand Jury Proceedings (Pavlick)***, 680 F.2d 1026, 1027 (1982) [***en banc***][12].

That is precisely what the District Court found, and the Court of Appeals affirmed, that IRS was doing here:

> "[T]he Court FINDS that, in the instant case, the IRS is not conducting an investigation with the correctness of Forms 8300 filed by Ritchie, Fels & Dillard P.C. ... To the contrary, ***the IRS is making general search for the identities of cash paying clients.***" ***U.S. v. Ritchie***, ___ F. Supp. ___, No. CIV-3-92-610, slip. op. at p. 7 (E.D. Tenn. September 11, 1992), ***aff'd***, ***U.S. v. Ritchie***, 15 F.3d 592, 599 (6th Cir. 1994).

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[12] The case the Fifth Circuit was there distinguishing, ***In Re Grand Jury Proceedings (Jones)***, 517 F.2d 666, 674 (5th Cir. 1975), had noted that:

> "The purpose of the privilege would be undermined if people were required to confide in lawyers at the peril of compulsory disclosure every time the government decided to subpoena attorneys it believed represented particular suspected individuals...
>
> In any event, the income tax aspects of the government's inquiry demonstrate a strong independent motive for why the unidentified clients could be expected to (1) seek legal advice, and (2) reasonably anticipate that their names would be kept confidential. The attorney-client privilege protects the motive itself from compelled disclosure, and the exception to the general rule protects the clients' identities when such protection is necessary in order to preserve the privileged motive." ***In Re Grand Jury Proceedings (Jones)***, 517 F.2d 666, 674-5 (5th Cir. 1975).

FORM OVER SUBSTANCE?

After finding that the law firm's summons fell within the requirements of §7609(f), the Sixth Circuit nevertheless held that "it would exalt form over substance to make the IRS go through the motions of having an ex parte court proceeding, getting the summons issued, serving it, defending a motion to quash, and filing a motion for enforcement", as expressly required by the statute. ***U.S. v. Ritchie***, 15 F.3d 592 (6th Cir. 1994) at appendix p.1a. However, this Court has made clear that where the IRS seeks to enforce a "third party summons", as was found to be the case below, the requirements of §7609(f) must be met. ***Tiffany Fine Arts, Inc. v. U.S.***, 469 U.S. 310, 322 (1985).

> "[I]f the district court finds in the enforcement proceeding that the IRS does not in fact intend to investigate the summoned party, or that some of the records requested are not relevant to a legitimate investigation of the summoned party, the IRS could not obtain all the information it sought ***unless*** it complied with I.R.C. §7609(f)." (emphasis supplied) ***Tiffany Fine Arts, Inc. v. U.S.***, 469 U.S. 310, 322 (1985).

This should be particularly so where, as here, the IRS has misrepresented their very purpose in seeking such information to the very Court the statute requires authorize same. It is important to note, as the Sixth Circuit opinion recognized, that "[t]he determinations required to be made under [§7609] subsection (f)...shall be made ***solely*** on the

petition and supporting affidavits", (emphasis supplied) ***U.S. v. Ritchie***, 15 F.3d 592, 600 (6th Cir. 1994), documents the District Court found to be false[13].

The Sixth Circuit Court of Appeals has placed its implicit stamp of permiture upon Government perjury regarding their enforcement of IRS Tax Code provisions, while that same Government Agency, utilizing these same provisions, now seeks to punish honest, ethical lawyers to a fine of at least $25,000.00 every time they attempt to follow their State Bar's Canons of ethics.

However "reluctant" the Sixth Circuit may have been to enforce the IRS summons to this law firm for client information, same was contrary to the decision of this Court in ***Tiffany Fine Arts, Inc. v. United States***, 469 U.S. 310, 105 S.Ct. 725, 83 L.Ed.2d 678 (1985), and Title 26 United States Code Section 7609(f)

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[13] A finding adopted and affirmed by the Sixth Circuit opinion utilizing the "clearly erroneous" standard. ***U.S. v. Ritchie***, 15 F.3d 592, 599 & n. 6 (6th Cir. 1994).

CONCLUSION

Excusing the Government's intentional misrepresentations as to the need to follow it's own regulations is one thing. But to leave ethical and conscientious attorneys with the choice between possibly losing their law licenses or the prospect of paying massive punitive fines to the IRS is quite another. The organized bar across the country is entitled to resolution of this ongoing and increasingly heated dispute. The writ for certiorari should issue.

Respectfully Submitted,

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APPENDIX A

No. 92-6393

UNITED STATES OF AMERICA

V.

ROBERT W. RITCHIE

United States Court of Appeals,
Sixth Circuit

Argued Nov. 19, 1993.
Decided Feb. 3, 1994.

Before: NELSON and BATCHELDER, Circuit Judges, and MATIA, District Judge.

FN* The Honorable Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

*595 ALICE M. BATCHELDER, Circuit Judge.

In this case we are asked to decide whether an IRS summons issued to a lawyer and instructing that the lawyer disclose the identity of and fee arrangement with certain cash-paying clients can survive a challenge by the lawyer that such information is protected from disclosure by the Fifth and Sixth Amendments. We reluctantly answer in the affirmative.

I.

A. Facts

Respondent-appellant Robert W. Ritchie practices law with Ritchie, Fels & Dillard, P.C., a Knoxville, Tennessee law firm. His practice consists primarily of criminal defense work. In the course of his practice, he occasionally receives cash payment for services rendered. In 1989 Ritchie received three cash payments over $10,000; pursuant to I.R.C. § 6050I, Ritchie submitted IRS Form 8300, notifying the Internal Revenue Service of the cash payments. Ritchie, however, refused to disclose (as also required by § 6050I and Form 8300) the nature of the services rendered or the name, address, and taxpayer identification number for each of the three clients. Ritchie instead informed the IRS that such information was privileged and that he was legally and ethically bound by the attorney-client privilege, the Fifth Amendment, the Sixth Amendment, and the Tennessee Code of Professional Responsibility not to disclose it.

Revenue Agent Rhonda Winter on behalf of the IRS issued a summons requiring that Ritchie produce documentary or testimonial evidence that would provide the information missing from the Forms 8300. Ritchie again refused to comply. Ritchie's three unnamed clients filed petitions as John Doe 1, John Doe 2, and John Doe 3 to quash the summons, and Ritchie's firm intervened on the side of its clients. [FN1]

FN1. This motion to quash also included another firm and several other Joe Does. Because these other parties are not before us on appeal (nor did they participate in the later enforcement proceeding), we do not discuss them further.

The case was assigned to District Judge Jarvis, and the IRS responded to the motion to quash by filing a motion to dismiss for lack of jurisdiction, arguing that neither the Does nor the law firm could oppose the summons at that stage of the summons process. It contended that the Does and the law firm must first refuse to obey the summons, and then after the IRS brought an action to enforce the summons, they could challenge the summons's validity in the enforcement proceeding. Judge Jarvis agreed and held that the general rule prohibits the summoned witness or the taxpayer from acting preemptively to enjoin a summons before the IRS has sought to enforce it and that this matter did not fall within any exception. Judge Jarvis also rejected the firm's contention that because the IRS's real interest was investigating the unnamed clients and not the law firm itself, the summons was invalid for failure to comply with I.R.C. § 7609(f), the John Doe summons provisions; the court held that because the IRS had at least some legitimate interest in the firm's tax liability, its other motivations were irrelevant.

The IRS then petitioned the court for an order enforcing the summons, and the case was assigned to District Judge Hull. After the court issued an order directing Ritchie to show cause why the summons should not be enforced, Ritchie responded that he could not comply because his cooperation would violate the attorney-client privilege, his clients' Fifth Amendment rights, his clients' Sixth Amendment rights, and the Tennessee Code of Professional Responsibility. He also argued that he had provided all the information that the IRS needed to investigate his or his firm's tax liability and that the only reason the IRS was seeking to enforce the summons was to get information about the John Doe clients. Because the IRS had not complied with the "John Doe summons" provisions, Ritchie argued, the IRS should not be permitted to enforce the summons. John Does 1, 2, and 3 intervened and raised similar

arguments. The government responded that two federal circuits had rejected Ritchie's position and that the district court should do the same. It also argued that Ritchie could *596 not relitigate Judge Jarvis's finding that the IRS had a legitimate reason for issuing the summons, namely, the investigation of Ritchie's law firm.

Judge Hull held an evidentiary hearing and issued an order enforcing the summons. He found that Ritchie's constitutional arguments had been persuasively rejected by the case law and saw no reason to hold otherwise. On the "John Doe summons" issue, the court found that even though the IRS had not used the John Doe summons procedure, the summons could be treated as a John Doe summons. Judge Hull then issued an order enforcing the summons, finding that it met the standards for the enforcement of a John Doe summons. This appeal followed.

B. Statutory Background

The Internal Revenue Code provides that "[a]ny person (1) who is engaged in a trade or business, and (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions), shall make the return described in subsection (b)." I.R.C. § 6050I(a). Subsection (b) identifies the required return as one that (1) "contains (A) the name, address, and TIN [taxpayer identification number] of the person from whom the cash was received, (B) the amount of cash received, (C) the date and nature of the transaction, and (D) such other information as the Secretary may prescribe," and (2) complies with the Secretary's regulations. I.R.C. § 6050I(b); see Treas.Reg. § 1.6050I-1(e)(2) (specifying Form 8300 as the required reporting form).

[1] Congress has charged the IRS with investigating taxpayers' compliance with revenue laws, see I.R.C. § 7601, [FN2] and the IRS has been given powerful means to do so:

FN2. Section 7601 provides: (a) General rule. -- The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

For the purpose of ascertaining the correctness of any return . . . or determining the liability of any person . . ., the Secretary is authorized (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; (2) To summon the person liable for tax or required to perform the act [e.g., filing a Form 8300] . . . to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; . . . I.R.C. § 7602(a). Courts have consistently held that § 7602 endows the IRS with expansive information-gathering authority. See, e.g., La Mura v. United States, 765 F.2d 974 (11th Cir. 1985). Probable cause in the traditional sense is not required for the IRS to investigate. See United States v. Bisceglia, 420 U.S. 141, 146, 95 S.Ct. 915, 919, 43 L.Ed.2d 88 (1975).

There are specific statutory requirements for issuing summonses to "third-party recordkeepers." See I.R.C. § 7609. [FN3] If the taxpayer whose tax liability is being investigated is a known, named individual, the IRS must give notice to that person that a summons has been issued to the third-party recordkeeper. I.R.C. § 7609(a). On the other hand, if the identity of the party under investigation is

unknown, notice need not be given (for obvious reasons), see I.R.C. § 7609(a)(4)(C), but other requirements apply to these "John Doe" summonses:

FN3. An attorney can be classified as a third-party recordkeeper. See I.R.C. § 7609(a)(3)(E).

(f) Additional requirement in the case of a John Doe summons. -- Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that-- (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons, (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have *597 failed to comply with any provision of any internal revenue law, and (3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources. I.R.C. § 7609(f).

[2][3] The mechanism for a taxpayer's challenge to a summons differs according to the statutory provision under which the summons is issued. If the summons is issued to the taxpayer whose potential tax liability is being investigated, that taxpayer may challenge the summons before the IRS hearing officer and may, if the IRS seeks enforcement of the summons in the district court, challenge the summons in district court. If the summons is issued to a third-party recordkeeper concerning a named taxpayer, the named taxpayer has the right to begin a proceeding to quash the summons (before an enforcement action is brought by the IRS), see I.R.C. § 7609(b)(2)(A), and to intervene in any

action brought to enforce the summons, see I.R.C. § 7609(b)(1). In the case of a John Doe summons, the Doe has no right to intervene in the hearing on the summons's issuance required by I.R.C. § 7609 (f), see I.R.C. § 7609(h)(2) ("The determinations required to be made under subsection [ ] (f) . . . shall be made ex parte and shall be made solely on the petition and supporting affidavits."), and the Doe has no right to file a motion to quash the summons once it has been issued, see I.R.C. § 7609(b)(2)(A) (only those entitled to notice under subsection (a) have the statutory right to begin a proceeding to quash); however, once an enforcement action is begun, the Doe may intervene and challenge enforcement of the summons. With the statutory framework in mind, we turn to discussion of the issues at hand.

II

We must decide several issues in this appeal. First, what factual findings are the appropriate basis for this court's opinion -- Judge Jarvis's findings or Judge Hull's findings? Second, in light of these factual findings, was Judge Hull's conclusion correct that the summons could and should be treated as a John Doe summons? Third, if this was for all intents and purposes a John Doe summons, is the summons enforceable as a John Doe summons? Finally, can enforcement of the IRS summons withstand Ritchie's constitutional challenges?

A. Factual Findings

As to the fact of this matter, there is considerable conflict between Judge Jarvis's opinion and Judge Hull's opinion. Once we determine which judge's factual statements are the appropriate factual findings, we must adopt them unless they are clearly erroneous. See Fed.R.Civ.P. 52(a).

In his written decision, Judge Jarvis made the following conclusions about the facts:

> Although it is conceded that the IRS is concerned with the identity of the clients, another focus of the summonses is the records that the law firms are required to maintain of their own income. Under the circumstances, the law firms are both the summoned persons and the taxpayers . . . .[I]n this case, the person "with respect to whose liability the summons is issued" is clearly the particular law firm. . . . Even if the IRS's primary purpose is to find out the identity of the law firm's clients, the IRS still has a legitimate investigative purpose for issuing the summonses to the law firms. . . . [These summonses are not John Doe summonses] since the summonses did identify the person with respect to whose liability the summons was issued, namely the law firms.

Doe v. United States, 777 F.Supp. 590, 594-95 (E.D. Tenn. 1991). Judge Jarvis concluded that because the summons had dual purposes it was therefore properly characterized as a standard-issue summons under § 7602(a), not subject to a motion to quash. He then dismissed the case for lack of jurisdiction.

Judge Hull concluded otherwise. After a full evidentiary hearing, Judge Hull first noted that "the IRS did not use the John Doe summons procedure or treat the Ritchie firm as a third-party record keeper[;] it proceeded as if the Ritchie firm were the actual target of its investigation." But he ultimately *598 concluded that the summons was solely for the purpose of gaining information about unnamed third-parties:

> In light of the very credible evidence offered by the respondent, the Court finds that, in the instant case, the IRS is not conducting an investigation into the correctness of Forms 8300 filed by Ritchie, Fels & Dillard, P.C., nor is it investigating the firm's liability for penalties [under the Code], as claimed. To the contrary, the IRS is making a general search for the identities of cash-paying clients.

This finding is in direct conflict with Judge Jarvis's statement that the summons had dual purposes.

The government contends that Ritchie was barred by the doctrine of res judicata from relitigating the purpose of the instant summons, that Judge Hull erroneously rejected this contention when he should have adopted Judge Jarvis's prior rulings, and that we are bound by the facts as Judge Jarvis found them. We disagree.

[4][5][6][7][8][9][10][11] Before Judge Jarvis was a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Motions to dismiss for lack of subject matter jurisdiction fall into two general categories: facial attacks and factual attacks. A facial attack is a challenge to the sufficiency of the pleading itself. On such a motion, the court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party. See Scheuer v. Rhodes, 416 U.S. 232, 235-37, 94 S.Ct. 1683, 1686-87, 40 L.Ed.2d 90 (1974). A factual attack, on the other hand, is not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction. On such a motion, no presumptive truthfulness applies to the factual allegations, see Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325

(6th Cir. 1990), and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. But the fact that the court takes evidence for the purpose of deciding the jurisdictional issue does not mean that factual findings are therefore binding in future proceedings. See id. ("The res judicata effect of a 12(b)(1) motion is . . . limited to the jurisdictional issue."); Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 at 225 (1990) ("Inasmuch as a Rule 12(b)(1) motion basically is one in abatement, a dismissal is not a decision on the merits and has no res judicata effect that would prevent the reinstitution of the action in a court that has subject matter jurisdiction over the controversy."). Where the court takes evidence for a limited purpose of ruling on jurisdiction, the preclusive effect of such findings is limited to the issue decided. See Shaw v. Merritt-Chapman & Scott Corp., 554 F.2d 786, 789 (6th Cir.) ("while a dismissal for lack of jurisdiction does not constitute an adjudication upon the merits, it does constitute a binding determination on the jurisdiction question, which is not subject to collateral attack"), cert. denied, 434 U.S. 852, 98 S.Ct. 167, 54 L.Ed.2d 122 (1977). This limitation on preclusive effect is soundly applied to a situation where, as here, the motion to dismiss was essentially a claim that the challenge was premature, not that the court has no subject matter jurisdiction over the dispute regardless of the timing of the challenge. [FN4] So, although Ritchie's clients were barred (after Judge Jarvis's ruling) from relitigating whether their motion to quash could be heard before the IRS brought an enforcement action, Judge Hull was not bound by any factual findings made by Judge Jarvis for the limited purpose of considering the jurisdictional challenge, and Judge Jarvis understood this to be the case, see Doe, 777 F.Supp. at 596 ("This court lacks jurisdiction over these petitions. . . . The petitioners and intervenors must await an IRS enforcement action before they can assert their claims that the summonses

are improper. I express no opinion with respect to the merits of the petitioners' and intervenors' claims.") [FN5]

FN4. The IRS basically conceded that the district court would later have jurisdiction over the dispute when it argued that the petitioners could not challenge the summons before an enforcement action was brought.

FN5. We distinguish those cases in which summary judgment is granted based on a jurisdictional issue or in which the jurisdictional issue is so factually intertwined with the merits of the action as to require a ruling on the merits with a ruling on the jurisdictional issue. These are different situations, requiring different analysis.

*599 [12] We are therefore left to consider Judge Hull's findings that the summons, although not a John Doe summons in form, was a summons addressing the precise situation in which John Doe summons should be used. As noted above, Judge Hull found that the IRS had proceeded as if the law firm were the actual target of its investigation, but that in actuality the IRS was not concerned with the firm's tax liability, but only with the identity of the clients who made the cash payments. Although there was evidence to contradict this view [FN6] and the IRS strenuously objects to Judge Hull's findings, his findings are not clearly erroneous, and we therefore adopt them.

FN6. In her affidavit before the court, Revenue Agent Winter swore that she was "conducting an investigation to ascertain the correctness of Forms 8300 filed by Ritchie, Fels & Dillard, P.C. pursuant to the provisions of Section 6050I of the Code [and] . . .investigating the liability, if any, of Ritchie, Fels & Dillard, P.C. for penalties imposed by Sections 6721 through 6723 of the Code."

B. Treatment of the Summons as a John Doe Summons

Having found that the IRS had no bona fide interest in Ritchie's firm's tax liability, Judge Hull reasoned that because the summons was essentially one addressed to the John Doe summons type of situation, he would treat the summons as if it were a John Doe summons and enforce it:

> In light of the foregoing, the Court will treat the instant enforcement procedure as if it were a Section 7609(f) procedure for a third-party John Doe summons. [Judge Hull then set out the statutory requirements for the issuance of a John Doe summons.]
>
> . . .In the instant case, we know that the summons in question relates to three particular persons who paid Mr. Ritchie in specific amounts of cash on three specific dates. Because these persons were seeking legal assistance from a well-known criminal defense attorney, because they sought to keep their identities secret, and because they obviously do business with large amounts of cash, there is a reasonable basis for believing that they may have failed to comply with certain provision of the Internal Revenue law. Finally, it is obvious that the information sought is not readily available from other sources. The Court believes that this minimal amount of information is sufficient to support the IRS summons, given the clear congressional intent behind the reporting requirement.

Accordingly, enforcement of the IRS summons in question is hereby ORDERED.

[13] Having adopted Judge Hull's findings of fact, we will affirm Judge Hull's decision to treat the summons as a John Doe summons. As previously discussed, the statutory requirements for summonses issued directly to the taxpayer differ from those for summonses issued to a third party, compare I.R.C. § 7602 with I.R.C. § 7609, and the IRS's interest in the instant case matches the statutory provisions for a John Doe summons, see § 7609(f). However, we must address several potential stumbling blocks that Judge Hull failed to consider. First, Judge Hull ignored the fact that the statute says that a John Doe summons may be served "only after a court proceeding in which the Secretary establishes [three enumerated elements]." I.R.C. § 7609(f) (emphasis added) (see text of statute set out supra). As the Supreme Court said in Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 322, 105 S.Ct. 725, 731, 83 L.Ed.2d 678 (1985), "if the district court finds in the enforcement proceeding that the IRS does not in fact intend to investigate the summoned party, or that some of the records requested are not relevant to a legitimate investigation of the summoned party, the IRS could not obtain all the information it sought unless it complied with § 7609(f)." [FN7] See also United States v. Powell, *600 379 U.S. 48, 57-58, 85 S.Ct. 248, 254-55, 13 L.Ed.2d 112 (1964) (in order to have its summons enforced, the IRS must show that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [IRS's] possession, and that the administrative steps required by the Code have been followed" (emphasis added).

FN7. Tiffany Fine Arts concerned the question whether an IRS summons under § 7602, which was issued

with the dual purpose of investigating both the summoned party's and the unnamed party's tax liability, had to meet the additional requirements of § 7609. The Court held that the summons did not, "as long as all the information sought is relevant to a legitimate investigation of the summoned taxpayer." Tiffany Fine Arts, 469 U.S. at 324, 105 S.Ct. at 732. Because Judge Hull rejected the IRS's contention that this was a dual-purpose summons, we need not answer the question whether the additional information sought from Ritchie by the IRS was "relevant to a legitimate investigation" of his firm.

[14] Notwithstanding the language of Tiffany Fine Arts and Powell, because of the unique facts of this case we will not require the IRS to start the process all over. The elements required by the statute have been reviewed by Judge Hull in a "court proceeding" prior to the enforcement of the summons, and thus the statutory protection to which Ritchie's clients are entitled have been afforded them in spirit, even if not by compliance with the letter of the law. [FN8] At this stage of the proceedings, it would exalt form over substance to make the IRS go through the motions of having an ex parte court proceeding, getting the summons issued, serving it, defending a motion to quash, and filing a motion for enforcement, all to bring us back to where we are now. [FN9] We are not suggesting that the IRS may in the future avoid going through the ex parte proceeding required by § 7609(f), for now the IRS has fair notice that if it cannot demonstrate a bona fide interest in investigating the tax liability of the party summoned, it must comply with § 7609(f).

FN8. The statutory protections are not strong in any event; the prior approval required is not difficult to obtain because it is given ex parte solely on the basis of the petition and supporting affidavits. See I.R.C. § 7609(h)(2).

FN9. We also note that it has been held that "the criteria in 26 U.S.C. § 7609(f) governing ex parte issuance of a John Doe summons pursuant to 26 U.S.C. § 7609(h)(1) are not appropriate grounds to challenge enforcement of the summons." In re Does, 688 F.2d 144, 145-46 (2d Cir. 1982) (footnote omitted). But see United States v. Brigham Young Univ., 679 F.2d 1345 (10th Cir. 1982) (holding that the summoned party may, in an enforcement proceeding, challenge the § 7609(f)(2) determination that there is a "reasonable basis for believing" there may be a violation of a revenue law), vacated and remanded (for consideration of possible mootness), 459 U.S. 1095, 103 S.Ct. 713, 74 L.Ed.2d 944 (1983).

[15] More important to our determination is the question whether the requirements of Tiffany Fine Arts and Powell were satisfied in this case. Our holding that in this case the IRS need not go back to square one and obtain an ex parte John Doe summons does not imply that the IRS is not required to meet the substantive factors of § 7609(f). The only criterion arguably not satisfied in this case is § 7609(f)(2), [FN10] which requires that "there be a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law." Although there may be a solid basis to believe that cash-paying criminal defense clients may fail or may have failed to comply with some provision of the Internal Revenue Code, the question is whether this is a legitimate basis for permitting the IRS to discover their names. As noted above, Judge Hull gave three grounds for finding the "reasonable basis" criterion met: (1) the persons were seeking legal assistance from a "well-known criminal defense attorney," (2) they sought to keep their identities secret, and (3) they dealt in large amounts of cash. We reject the first two grounds. While statistically speaking there may be a high correlation between acting in secret to

consult well-known criminal defense counsel and being guilty of internal revenue violations, we doubt this is a constitutionally permissible inference. Our legal system requires that the innocent and the guilty alike be permitted to consult counsel on legal matters without attaching penalty to the exercise of that right. To allow such consultation to be used as the basis for creating a class of suspected tax law violators is to unduly burden the right to consult one's attorney. For this *601 reason we cannot approve the district court's reliance on these two factors.

FN10. The other two criteria under § 7609(f) -- (f)(1) and (f)(3) -- are easily satisfied.

[16] As to the third factor -- paying for services with large amounts of cash -- Ritchie asserts an argument similar to the one we have used to reject the district court's first two grounds: to permit the IRS to discover and target those who pay large sums of cash for legal representation would penalize the exercise of a constitutional right. But if Ritchie's argument on this point has a certain persuasive power, it is only because he diverts our focus from the nature of the payment to the surrounding circumstance of the attorney-client relationship. Ritchie argues that "consultation with counsel cannot constitutionally be used to establish 'reasonable basis' for believing that the client has failed to comply with certain provisions of internal revenue law." Ritchie describes the suspect act as "consult[ing] with counsel," but this is not the case; the suspect act is paying over $10,000 in cash for anything -- in this case legal services. Ritchie continues by arguing that "[a client] must also be afforded the assurance that his choice of attorney will not generate any additional government interest in him as a criminal suspect." Again, while we agree with Ritchie's proposition, the IRS's investigation has nothing to do with

the client's choice of attorney; it has everything to do with how the client paid for the services of his attorney.

There may be legitimate grounds for objecting to the government's close supervision of citizens' dealings in currency, but this is an objection to Currency Transaction Reports and the like, not an objection to the government's requirement that a particular profession disclose which of its clients have chosen to deal in large amounts of cash. As was said in United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991):

> Section [6050I] does not preclude would-be clients from using their own funds to hire whomever they choose. To avoid disclosure under section [6050I], they need only pay counsel in some other manner than with cash. The choice is theirs. None of the appellants has advanced a legitimate reason why payment other than in cash cannot be made.

Id. at 504. Although a good argument can be made that citizens should have the right to pay for services in cash without inviting the eyes of Government to scrutinize their financial affairs, we have searched in vain to find support for the proposition that there is a constitutionally protected liberty interest in spending large amounts of cash without having to account for it. Cf. United States v. Bisceglia, 420 U.S. 141, 149, 95 S.Ct. 915, 920, 43 L.Ed.2d 88 (1975) ("[The IRS] has a legitimate interest in large or unusual financial transactions, especially those involving cash. The reasons for that interest are too numerous and too obvious to catalog."). We must conclude that there is no reason to grant law firms a potential monopoly on money laundering simply because their services are personal and confidential; other businesses must divulge the identity of their cash-

paying clients in keeping with lawful revenue regulations and law firms should not be an exception to this rule. We therefore hold that the simple fact that these clients paid for legal services with large amounts of cash is a sufficient "reasonable basis" upon which to issue the John Doe summons.

C. Constitutional Challenges to the Summons

Moving now to the heart of Ritchie's objections, Ritchie argues four separate grounds for finding the summons unenforceable.

1. Sixth Amendment

[17] Ritchie argues that divulging the requested information about his clients would violate their Sixth Amendment right to counsel because it would (1) interfere with the ability of citizens to retain counsel, (2) discourage free and open communication between client and attorney, and (3) possibly destroy the attorney-client relationship through the disqualification of counsel who is later called testify as to the form of payment.

At least two of our sister circuits have fully addressed this argument and soundly rejected it. See United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 503-04 (2d Cir. 1991); Tornay v. United States, 840 F.2d 1424, 1429-31 (9th Cir. 1988). We do the *602 same for the reasons given in Goldberger and Tornay.

2. Fifth Amendment

[18] Ritchie next argues that compelling him to provide evidence against his clients violates his clients' Fifth Amendment right against self-incrimination. This argument

too has been soundly rejected by our sister circuits. See, e.g., Goldberger, 935 F.2d at 503. The privilege against self-incrimination is a personal privilege, see Couch v. United States, 409 U.S. 322, 328, 93 S.Ct. 611, 616, 34 L.Ed.2d 548 (1973), and here the client is not the one being compelled. And the attorney may not object that the client may be incriminated by the attorney's testimony (at least not on that ground), see In re Grand Jury Proceedings (Gordon), 722 F.2d 303, 308 (6th Cir. 1983), cert. denied, 467 U.S. 1246, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984); the attorney may, of course, assert the attorney-client privilege if the requested information is actually privileged. [FN11] Furthermore, the information required must be incriminating or integrally linked with behavior deemed offensive in order for the Fifth Amendment to be implicated, See United States v. Alkhafaji, 754 F.2d 641 (6th Cir. 1985) (analyzing several Supreme Court decisions in this area); paying one's attorney in cash does not fall within this category.

FN11. Ritchie relies on Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976), for the proposition that "[a] privilege in the hands of a client is not lost in the hands of his counsel," citing id. at 405, 96 S.Ct. at 1578. What Ritchie neglects to mention is that a similar comment was made in Fisher but as to the attorney-client privilege, not the Fifth Amendment privilege against self-incrimination. In fact, Fisher specifically held that the Fifth Amendment did not prohibit the enforcement of a summons issued by the IRS to the taxpayer's attorney for accounting documents related to the representation: "compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself." Id. at 402, 96 S.Ct. at 1576. "The taxpayer's privilege under [the Fifth] Amendment is not violated by enforcement of the summonses involved in these cases because enforcement

against a taxpayer's lawyer would not 'compel' the taxpayer to do anything -- and certainly would not compel him to be a 'witness' against himself." Id. at 397, 96 S.Ct. at 1574.

3. Attorney-Client Privilege

Ritchie argued below that disclosure of this information would violate the attorney-client privilege. He has apparently abandoned this argument on appeal, for it appears nowhere in his brief. [FN12] In any event, virtually every court to consider the issue has concluded that client identity and payment of fees is not privileged information. [FN13] See, e.g., In re Grand Jury Proceedings (Damore), 689 F.2d 1351, 1352 (11th Cir. 1982). And on facts similar to the case at bar, the attorney-client privilege has been held not to be a barrier to enforcement of the summons. See Goldberger, 935 F.2d at 504-05; Tornay, 840 F.2d at 1426-29. [FN14]

FN12. He mentions the attorney-client relationship as part of his discussion of the Sixth Amendment right-to-counsel issue, but he does not argue the attorney-client privilege.

FN13. Some circuits recognize the "last link" doctrine as an exception to this general principle. See, e.g., In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975). However, our circuit has expressly rejected the last link doctrine, see In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447 (6th Cir. 1983), cert. denied, 467 U.S. 1246, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984), and even circuits that do approve of the last link doctrine have held on facts similar to those in the case at bar that the doctrine did not prevent enforcement of the IRS's summons, see United States v. Leventhal, 961 F.2d 936, 940-41 (11th Cir. 1992).

FN14. Related to this claim was Ritchie's argument below that disclosure would also violate the Tennessee Code of Professional Conduct. Ritchie has abandoned this argument on appeal.

4. Due Process Violation

[19] Ritchie also argues that disclosure of the requested information places the criminal defense lawyer in the role of providing evidence against his clients for use in criminal prosecution. This, he argues, violates the Due Process Clause by encroaching on the constitutionally required adversary system.

Ritchie never raised this argument below, so we do not consider it. In any case, the argument has been rejected by the other courts that have addressed it. See Tornay, 840 F.2d at 1431.

*603 III

The district court's order enforcing the IRS summons is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

UNITED STATES OF AMERICA	§	
	§	
V.	§	**NO. CIV-3-92-610**
	§	
ROBERT W. RITCHIE, personally	§	
and in his representative	§	
capacity as a partner/officer	§	
of Ritchie, Fels & Dillard, P.C.	§	

ORDER

This action to enforce an Internal Revenue Service (IRS) summons issued to respondent Robert W. Ritchie, in his personal capacity and as a partner in the law firm of Ritchie, Fels & Dillard, P.C. (Ritchie), came before the Court for a hearing on Monday, August 31, 1992. Besides having the benefit of briefs and argument from the parties, the Court was assisted by amicus briefs from the National Association of Criminal Defense Lawyers, the Tennessee Bar Association, and the Knoxville Bar Association.

At issue is the broad question of whether or not Section 6050I of the Internal Revenue Code should be applied to practicing attorneys. Also at issue is the narrow question of whether the particular IRS summons issued to Mr. Ritchie should be judicially enforced.

Section 6050I requires any person engaged in a trade or business who receives more than $10,000.00 in cash to file with the IRS an information return (Form 8300) disclosing, among other things, the name, address, and taxpayer identification number of the person from whom the cash was received.

It is undisputed that in 1989, Ritchie filed with the IRS three incomplete Forms 8300 reporting receipts of cash in the amount of $25,000.00 on May 8, 1989, $10,000.00 on June 30, 1989, and $13,000.00 on July 28, 1989, and that these forms failed to disclose information which would identify the person or persons from whom the cash was received. In each case, the firm asserted that the client-identifying information was privileged. On May 16, 1990, the IRS issued a summons to respondent Ritchie requiring him to give testimony concerning these incomplete forms and to produce certain books, records, papers and other data not in the possession of the IRS. Ritchie failed to comply.

On January 15, 1992, the United States filed the instant petition to enforce the IRS summons. The petition is supported by the affidavit of Revenue Agent Rhonda Winter who claims she is conducting an investigation into the correctness of Forms 8300 filed by the Ritchie firm; the firm's potential tax liability under Sections 6721 and 6723; and the firm's liability, if any, for penalties imposed by Sections 6721 through 6723 of the Code. Agent Winter does not claim that her primary or even secondary purpose is to identify the firm's cash-paying clients to investigate their tax liabilities.

Ritchie and his clients, John Doe intervenors opposed to the summons, have responded contending that disclosure of the information summonsed would: (1) violate the clients' sixth amendment rights to effective assistance of counsel; (2) violate the clients' fifth amendment protection from self-incrimination; (3) violate the attorney-client privilege; and (4) violate the Code of Professional Responsibility promulgated by the Supreme Court of the State of Tennessee. They also suggest that Agent Winter's affidavit is incorrect and that the primary purpose of the investigation is to obtain information about unnamed clients in order to investigate and prosecute them or to use such evidence against them in other criminal proceedings. They contend that, in cases such as this one,

the IRS should be required to follow the Section 7609(f) "John Doe Summons" procedure for obtaining information from a third-party record keeper. Section 7609(f) requires that the IRS obtain an ex parte order from a district court prior to the issuance of a summons "which does not identify the person with respect to whose liability the summons is issued."

While the broad question has yet to be addressed by the United States Court of Appeals for the Sixth Circuit, it has been thoroughly considered by the Second and Eleventh Circuit Courts. See United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2nd Cir. 1991), and United States v. Leventhal, 961 F.2d 936 (11th Cir. 1992).

The Goldberger Court rejected the constitutional arguments and noted that, when Congress expanded the reporting requirements for cash transactions in excess of $10,000.00 to apply them to any person engaged in a trade or business, there were extensive lobbying efforts to exempt attorneys from the reach of this legislation. 935 F.2d at 503. Congress was concerned with unreported income connected with illegal activities and sought a mechanism for identifying taxpayers with large cash incomes. It obviously rejected the lobbying efforts to secure an exemption for attorneys and, from this, we can infer a congressional intent that, when they conflict, the attorney-client privilege should give way to the reporting requirement. Id. at 506.

In Leventhal, the Eleventh Circuit took the same approach, reaffirming previous rulings that the "identity of a client or matters involving the receipt of fees from a client are not normally within the [attorney-client] privilege." 961 F.2d at 940. It did allow a narrow exception to this rule, which it termed the "last link doctrine," for situations where the disclosure of non-privileged attorney-client information would also reveal privileged information. However, in the Leventhal situation, the clients involved in the two challenged cash transactions were already under indictment

for the crimes for which they had purchased representation. In other words, their identities were already known. Under those circumstances, the court ordered enforcement of the IRS summons.

This Court has thoughtfully reviewed the briefs, considered the arguments of counsel, and satisfied itself that the Second and Eleventh Circuits have taken the right approach. In general, it sees no reason why attorneys should be exempted from the reporting requirement. Nevertheless, it recognizes that there may be instances where the identity of a cash-paying client may be privileged -- particularly when the government is unaware of the existence of the individual. The Court FINDS that in the rare case where the identity of the client may itself be privileged, attorneys should follow the procedure used by the Ritchie firm and file their Forms 8300 without identifying their clients. In these rare cases, if the IRS feels it needs the client information, it should follow the "John Doe Summons" procedure specified in Section 7609(f) and obtain an ex parte court order from a district court prior to the issuance of its summons.

With regard to the specific case at hand, the IRS did not use the John Doe summons procedure or treat the Ritchie firm as a third-party record keeper. It proceeded as if the Ritchie firm were the actual target of its investigations. The affidavit of Rhonda Winter, Revenue Agent of the IRS, claiming that she was investigating the firm's tax liability was sufficient to establish a prima facie case for enforcement. United States v. Leventhal, 961 F.2d at 939.

Once the United States had made its preliminary showing, the burden shifted to the respondent to show that the enforcement of the summons would constitute an abuse of the court's process.[1] At the hearing, defendant Ritchie

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[1]The United States contends that defendant Ritchie and the intervenors are estopped from presenting evidence on the question of the true purpose of the IRS summons on the basis of a decision by Judge H. James Jarvis

offered his own testimony and that of his partner Charles Fels, that Revenue Agent Winter personally assured them that neither Mr. Ritchie, individually, nor their firm was under investigation. In addition, they offered a copy of a March 15, 1990, article by IRS Commissioner Fred T. Goldberg in USA Today, entitled "IRS needs to know who's paying in cash," which bolsters their contention that the IRS is not investigating them, as it claims, but seeking the identities of persons who do business in large amounts of cash.

In light of the very credible evidence offered by the respondent, the Court FINDS that, in the instant case, the IRS is not conducting an investigation into the correctness of Forms 8300 filed by Ritchie, Fels & Dillard, P.C., nor is it investigating the firm's liability for penalties imposed by Sections 6721 through 6723 of the Code, as claimed. To the contrary, the IRS is making a general search for the identities of cash-paying clients.

In light of the foregoing, the Court will treat the instant enforcement procedure as if it were a Section 7609(f) procedure for a third-party John Doe summons. Under this procedure, the IRS must establish that-

> (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
>
> (2) there is a reasonable basis for believing that such person or group or class of persons

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in Doe, et al. v. United States, Misc. 90/988, -999, and -100. That action was a petition to quash summons, filed by the firms of Ritchie, Fels & Dillard, P.C. and Harwell, Baumgartner & Willis, P.A., which sought to preempt any enforcement action by the IRS. However, Judge Jarvis found that the Court lacked subject matter jurisdiction and specifically did not rule on the merits of enforcement. He concluded that the "petitioners and intervenors must await an IRS enforcement action before they can assert their claims that the summonses are improper."

> may fail or may have failed to comply with any provision of any internal revenue law, and
>
> (3) the information sought to be obtained from the examination of the records (and the identity of the person of persons with respect to whose liability the summons is issued) is not readily available from other sources.

In the instant case, we know that the summons in question relates to three particular persons who paid Mr. Ritchie in specific amounts of cash on three specific dates. Because these persons were seeking legal assistance from a well-known criminal defense attorney, because they sought to keep their identities secret, and because they obviously do business with large amounts of cash, there is a reasonable basis for believing that they may have failed to comply with certain provisions of the Internal Revenue law. Finally, it is obvious that the information sought is not readily available from other sources. The Court believes that this minimal amount of information is sufficient to support the IRS summons, given the clear congressional intent behind the reporting requirement.

Accordingly, enforcement of the IRS summons in question is hereby ORDERED.

ENTERED:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

APPENDIX C

Copr.(C) West 1994 No claim to orig. U.S. Govt. works.
777 F.Supp. 590
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John DOE, John Doe I, John Doe II through John Doe VIII, Petitioners,

v.

UNITED STATES of America, Acting By and Through the DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE, KNOXVILLE, TENNESSEE, Respondent.

Misc. Nos. 90/998 to 90/1000.
United States District Court,
E.D. Tennessee, N.D.
May 23, 1991.

Clients and law firms petitioned court to quash Internal Revenue Service (IRS) summonses seeking to require law firms to provide records and information disclosing identity of client who paid cash fees in excess of $10,000. Government moved to dismiss. The District Court, Jarvis, J., held that: (1) law firms were not summoned in capacity of third-party record keepers; (2) summonses were not "John Doe summonses"; and (3) court lacked jurisdiction under either its supervisory power or under Declaratory Judgment Act.

Motion granted.

[1] INTERNAL REVENUE k4507
220k4507
On motion to dismiss petition to quash IRS summonses, petition must be viewed in light most favorable to petitioner; allegations are taken as true, and petition should not be dismissed if it can reasonably be conceived that petitioner

can make case on trial which would entitle him to some relief. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

[2] INTERNAL REVENUE k4499
220k4499
Internal Revenue Service (IRS) summonses issued to law firms to obtain records and information disclosing identity of clients who paid cash fees in excess of $10,000 were not "third-party record keeper" summonses, and thus, statute providing that taxpayer's business records in hands of caretaker will not be produced to IRS unless taxpayer is given notice and opportunity to challenge production provided no basis for taxpayers' petition to quash summonses; summonses did not require production of records made or kept of business transactions or affairs of any person other than law firms. 26 U.S.C.A. s 7609(a)(1)(B).
See publication Words and Phrases for other judicial constructions and definitions.

[3] INTERNAL REVENUE k4499
220k4499
Attorney served with summons seeking records of his own transactions in connection with investigation into his own tax or filing obligations is not "third-party record keeper" for purposes of statute precluding taxpayer's business records in hands of caretaker from being produced to IRS unless taxpayer is given notice and opportunity to challenge production; this is true even though records may incidentally reveal information about some other individual. 26 U.S.C.A. s 7609(a)(1)(B).
[4] INTERNAL REVENUE k4499
220k4499
Internal Revenue Service (IRS) summonses requiring law firms to provide records and information disclosing identity of clients who paid cash fees in excess of $10,000 were not

"John Doe summonses," and thus, IRS was not required to comply with statute specifying additional requirements with respect to John Doe summonses; John Doe summons does not identify person with respect to whose liability summons was issued, but summonses in immediate case person "with respect to whose liability the summons [was] issued" was clearly particular law firm, and IRS had legitimate investigative purpose for issuing summonses to law firms. 26 U.S.C.A. s 7609(f).
See publication Words and Phrases for other judicial constructions and definitions.

[5] FEDERAL COURTS k3.1
170Bk3.1
Formerly 170Bk3
District court lacked jurisdiction under its supervisory power to quash Internal Revenue Service (IRS) subpoena which could conceivably conflict with district court's local rules.

[6] INTERNAL REVENUE k4507
220k4507
Federal tax exception to Declaratory Judgment Act and Anti-Injunction Act precluded district court's jurisdiction over petitions to quash Internal Revenue Service (IRS) summonses seeking to require law firms to provide records and information disclosing identity of clients who paid cash fees in excess of $10,000; Government had at least arguable position that summonses did not violate any constitutional provision, and both law firms and clients would have right to judicial review should IRS come before court to enforce summonses. 28 U.S.C.A. s 2201; 26 U.S.C.A. s 7421(a).

***591** Ralph E. Harwell, Harwell, Baumgartner & Willis, W. Thomas Dillard, Ritchie, Fels & Dillard, Knoxville, Tenn., and Goldstein, Goldstein & Hilley, San Antonio, Tex., for petitioners.

Jose Francisco DeLeon, U.S. Dept. of Justice, Tax Div., Washington, D.C., for respondent.

Hal D. Hardin, Nashville, Tenn., for amicus curiae Tennessee Bar Ass'n.

*592 MEMORANDUM OPINION

JARVIS, District Judge.

These three petitions ask this court to quash summonses issued by the Internal Revenue Service (IRS) to the law firms of Ritchie, Fels & Dillard, P.C. and Harwell, Baumgartner & Willis, P.A. (hereinafter "the law firms"). The petitioners are unnamed clients of the two law firms and the petitions are said to arise under 26 U.S.C. s 7609. The two law firms themselves have also intervened in these actions. . Currently pending are the respondent's motions to dismiss for lack of subject matter jurisdiction, Rule 12(b)(1), Federal Rules of Civil Procedure. Because I agree that this court lacks subject matter jurisdiction in these cases, the motions to dismiss are granted.

I.

Petitioners' Factual Allegations

For purposes of the pending motions, the factual allegations made in the petitioners' petitions will be considered in the light most favorable to the petitioners.

26 U.S.C. s 6050I(a) requires any person who is engaged in trade or business, and who, in the course of such trade or business, receives more than $10,000 in cash in one transaction, to make a tax return reporting the transaction. The return is required to be in such form as the Secretary prescribes (Form 8300), and is to contain the name, address, and tax identification number of the person from whom the cash was received; the amount received; the date and nature of the transaction; and such other information as the Secretary requires. Section 6050I(b); see generally, 26 C.F.R. 1.6050I-1, 1.6050I-1T (implementing an interpretative regulation). In early 1990, the IRS issued

summonses to the law firms requesting information pertaining to Forms 8300 which the law firms filed. These Forms 8300 record payments of more than $10,000 each to the law firms from clients who are identified as "John Does" on the forms. Essentially, the summonses seek to require the law firms to provide records and information which would disclose the identity of these clients who paid cash fees in excess of $10,000 each to the law firms.

The law firms allege that these clients have directed them not to disclose their identities to the IRS, based on the attorney/client privilege. Further, the law firms have refused to disclose the John Does' identities based upon the attorney/client privilege, the mandates of the Code of Professional Responsibility, the Advisory Ethics Opinion of the Supreme Court of Tennessee, and the prohibitions of Tennessee law. Further, the law firm of Ritchie, Fels & Dillard alleges that Revenue Agent Rhonda Winter advised the law firm that it is not the subject of any IRS investigation of the firm's tax liability or compliance with the IRS Code. Finally, the petitioners allege that this information is sought for the purposes of determining the identity of the John Doe clients.

The petitioners have petitioned the court to quash the summonses issued pursuant to 26 U.S.C. s 7609.

II.

Applicable Legal Standards

[1] On the Government's motion to dismiss, the petition must be viewed in the light most favorable to the petitioner. The petition should not be dismissed if it can reasonably be conceived that petitioner can make a case on trial which would entitle him to some relief. Madison v. Purdy, 410 F.2d 99 (5th Cir.1969). The allegations of the petition should be taken as true for purposes of the determination of a motion to dismiss. Hughes v. Rowe, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980).

The petitioners base their allegations of subject matter jurisdiction on the following: (1) that the law firms are "third-party record keepers" pursuant to 26 U.S.C. s 7609(a)(3); (2) that the summonses in question are "John Doe" summonses pursuant to 26 U.S.C. s 7609(f); *593 (3) the court's supervisory power to enforce its own code of professional conduct; and (4) the Declaratory Judgment Act, 28 U.S.C. s 2201. The Government disputes each of these bases for jurisdiction.

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress. Bender v. Williamsport Area School District, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986). The United States, as sovereign, may not be sued without its consent. United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). No suit may be maintained against the sovereign unless the suit is brought in exact compliance with the terms of the statute under which the sovereign has consented to be sued. Soriano v. United States, 352 U.S. 270, 276, 77 S.Ct. 269, 273, 1 L.Ed.2d 306 (1957).

III.

Analysis

IRS summonses are not self-enforcing. Reisman v. Caplin, 375 U.S. 440, 445-46, 84 S.Ct. 508, 511-12, 11 L.Ed.2d 459 (1964). Instead, district courts are given the power to enforce such summonses upon a proper showing. See 26 U.S.C. ss 7402(b), 7604. At an enforcement proceeding, "the witness may challenge the summons on any appropriate ground," including "the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, as well as that it is protected by the attorney- client privilege." Reisman, 375 U.S. at 449, 84 S.Ct. at 513. Generally, the opportunity to be heard in connection with an enforcement proceeding offers the

witness or the taxpayer sufficient due process, and neither the summoned witness nor the taxpayer may act pre-emptively to enjoin a summons which the IRS has not sought to enforce. Id., at 450, 84 S.Ct. at 514. There are at least two statutory exceptions to this general rule, both of which the petitioners rely upon. The first is the "third-party recordkeeper summons" pursuant to 26 U.S.C. s 7609. The second is the "John Doe summons" pursuant to 26 U.S.C. s 7609(f).

As a general rule, neither a summoned party nor the taxpayer under investigation has any right to initiate an action to quash a summons or to prevent the summoned party from complying voluntarily. Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964). Section 7609 of the Code creates limited exceptions to that rule with respect to summonses issued to statutorily enumerated "third-party recordkeepers" and the so-called "John Doe summonses". Section 7609 gives taxpayers certain notice of procedural rights in a case of third-party summonses. Section 7609(a) provides as follows: Notice.-- (1) In general.--If-- (A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and (B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons. The rights created by s 7609 extend to summonses issued pursuant to s 7602(a)(2), as are the summonses challenged here. Section 7609(b)

provides that any person entitled to notice of the summons may bring an action to quash the summons in the appropriate district court, and s 7609(h) confers jurisdiction to hear that action upon the United States District Court for the district in which the summoned party ***594** resides or may be found. Section 7609(a)(3)(E) provides that among those considered to be a "third-party recordkeeper" is "any attorney."

This action is purportedly brought by the John Doe clients pursuant to s 7609(b)(2)(A), with the law firms intervening as the third-party recordkeepers. The IRS contends that the law firms are simply not third-party recordkeepers and therefore the court lacks jurisdiction under s 7609.

[2][3] Petitioners point out that included among those considered to be "third-party recordkeepers" is "any attorney". 26 U.S.C. s 7609(a)(3)(E). However, it is simply not enough to be "any attorney" to fall within the protection of s 7609. Section 7609(a)(1)(B) indicates that the section only applies if "the summons requires the production of any portions of records made or kept of the business transactions or affairs of any person (other than the person summoned)." Congress' concern in passing s 7609 was that a taxpayer's business records in the hands of a caretaker not be produced to the IRS unless the taxpayer is given notice and an opportunity to challenge the production. In this case, the summonses served upon the law firms do not require the production of records made or kept of the business transactions or affairs of any person other than the law firms. An attorney served with a summons seeking records of his own transactions in connection with an investigation into his own tax or filing obligations is not a "third-party recordkeeper", even though the records may incidentally reveal information about some other individual. United States v. Berg, 636 F.2d 203, 206 (8th Cir.1980); United States v. Bass, 784 F.2d 1282, 1286 (5th Cir.1986). In this case, the summonses were issued to the law firms to obtain records of

their own business transactions to obtain information that they failed to supply on the Forms 8300. Under the circumstances, these are not third-party recordkeeper summonses and therefore s 7609 provides no jurisdiction.

Moreover, s 7609(a)(4) specifically excepts from the notice requirement "any summons served on the person with respect to whose liability the summons is issued, or any officer or employee of such person." In this case, the law firms are the persons with respect to whose liability the summonses are issued. Although the records sought pertain to the clients, they are not the clients' records, they are not records of the clients' transactions with third- parties, and they are not prepared or maintained by the law firms on behalf of their clients. Although it is conceded that the IRS is concerned with the identity of the clients, another focus of the summonses is the records that the law firms are required to maintain of their own income. Under the circumstances, the law firms are both the summoned persons and the taxpayers.

[4] Petitioners also argue that the summonses are "John Doe summonses" and should be quashed because the IRS has not complied with the requirements of s 7609(f). That section provides as follows: (f) Additional requirement in the case of a John Doe Summons.--Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that--(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons, (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of the Internal Revenue law, and (3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other

sources. 26 U.S.C. s 7609(f). This section allows the IRS to apply to a district court ex parte for a John Doe summons. By virtue of the language of the statute, a John Doe summons is one "which does not identify the person with respect to whose liability the *595 summons is issued." However, in this case, the person "with respect to whose liability the summons is issued" is clearly the particular law firm.

The petitioners contend that these are John Doe summonses because the Government has no interest in the law firm's obligations under the IRS Code, but are merely seeking to identify their clients. In Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 317 n. 5, 105 S.Ct. 725, 729 n. 5, 83 L.Ed.2d 678 (1985), the Court held that where, pursuant to s 7602(a), the IRS serves a summons on a known taxpayer with the dual purpose of investigating both the taxpayer's tax liability and unnamed parties' tax liabilities, it need not comply with s 7609(f), as long as all of the information sought is relevant to a legitimate investigation of the summoned taxpayer. The court noted that it is irrelevant whether obtaining other information was the IRS's "primary or secondary purpose"; "all that matters is that the IRS was pursuing a legitimate investigation of [the taxpayer]." Id. at n. 5. Even if the IRS's primary purpose is to find out the identity of the law firm's clients, the IRS still has a legitimate investigative purpose for issuing the summonses to the law firms. A properly completed Form 8300 gives the IRS the means to verify the source and amounts of cash income above a certain figure. Otherwise, the IRS is compelled to simply take the taxpayer at his word. It cannot be said that compelling the proper completion of Form 8300 has no legitimate purpose to the IRS. The fact that the IRS has a legitimate investigative purpose in issuing the summons to the law firms removes them from the requirements of s 7609(f) since the summonses did identify the person with respect to whose liability the summons was issued, namely

the law firms. Since these are neither third-party recordkeeper summonses nor John Doe summonses, s 7609 cannot be a basis for this court's jurisdiction over these petitions.

[5] The petitioners also argue that this court has jurisdiction over this action pursuant to its inherent supervisory power to enforce its local rules and supervisory power over attorneys. Petitioners point out that the local rules of this district have adopted the Supreme Court of Tennessee's "Code of Professional Conduct" as the official rules of professional conduct for members of the bar of this district. There is no question that district courts possess the statutory authority to adopt local rules and have inherent supervisory authority to regulate the conduct of attorneys practicing before them. The function of these rules is to regulate the practice of the court and to facilitate the transaction of the court's business. However, these rules cannot enlarge or restrict the court's jurisdiction, nor can they abrogate or modify substantive law. Washington-Southern Navigation Company v. Baltimore & Philadelphia Steamboat Company, 263 U.S. 629, 635, 44 S.Ct. 220, 222, 68 L.Ed. 480 (1924). "Even a sensible use of a supervisory power is invalid if it conflicts with the constitutional or statutory provisions." Thomas v. Arn, 474 U.S. 140, 148, 106 S.Ct. 466, 471, 88 L.Ed.2d 435 (1985). This court lacks jurisdiction under its supervisory power to quash an IRS subpoena which could conceivably conflict with its local rules.

[6] Finally, petitioners contend that this court has jurisdiction to declare the rights at issue under the Declaratory Judgment Act, 28 U.S.C. s 2201. The respondent contends that this court has no jurisdiction to make a declaratory judgment regarding the summonses in question. The respondent relies on the plain language of the Declaratory Judgment Act which reads: In a case of actual controversy within its jurisdiction, except with respect to

federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. 28 U.S.C. s 2201 (emphasis added).

The Anti-Injunction Act similarly restricts the court's power to grant injunctive relief by providing that Except as provided in [statutes not relevant here], no suit for the purpose of ***596** restraining the assessment or collection of any tax shall be maintained by any person, whether or not such person is the person against whom such tax was assessed. 26 U.S.C. s 7421(a).

The purpose of the federal tax exception to the Declaratory Judgment Act and the Anti-Injunction Act is to protect the Government's ability to assess and collect taxes free from pre-enforcement judicial interference and to require that disputes be resolved in a suit for a refund. Bob Jones University v. Simon, 416 U.S. 725, 736-37, 94 S.Ct. 2038, 2045-46, 40 L.Ed.2d 496 (1974).

There are two exceptions to the general rule barring declaratory and injunctive relief in cases involving federal taxes. See id., at 742, 94 S.Ct. at 2048. The first is where the Government could under no circumstances ultimately prevail and the prerequisites for equity jurisdiction are met. Id. at 742-46, 94 S.Ct. at 2048-51. The second exists where "an aggrieved party has no access at all to judicial review." Id. 94 S.Ct. at 2050. Petitioners can meet neither of these exceptions in this case. This is not a case where the Government could under no circumstances prevail. It is clear that the Government has at least an arguable position that the summonses do not violate any constitutional provision. In addition, both petitioners and intervenors in this case have a right to judicial review should the IRS come before this court to enforce the summonses. If the Government brings a proceeding to enforce the summonses, both petitioners and intervenors may challenge the

summonses "on any appropriate ground". Reisman v. Caplin, 375 U.S. 440, 449, 84 S.Ct. 508, 513, 11 L.Ed.2d 459 (1964).

Finally, petitioners contend that the tax exception to the Declaratory Judgment Act and the Anti-Injunction Act are not applicable here since this is simply not a tax case. The court disagrees. Whatever other purpose the reporting requirement established by s 6050I may serve, the Government has at least one legitimate reason for requiring a properly completed Form 8300 since it gives the IRS the means to verify the source and amounts of items of cash income received by the law firms. These petitions do attempt to enjoin activities which could culminate in the collection of taxes and are therefore forbidden. Blech v. U.S., 595 F.2d 462, 466 (9th Cir.1979); U.S. v. Dema, 544 F.2d 1373 (7th Cir.1976), cert. denied, 429 U.S. 1093, 97 S.Ct. 1106, 51 L.Ed.2d 539 (1977).

In conclusion, the law firms in this case have not been summoned in the capacity of third-party recordkeepers, nor have they been served with John Doe summonses. This court lacks jurisdiction over these petitions under either its supervisory power or under the Declaratory Judgment Act. The petitioners and intervenors must await an IRS enforcement action before they can assert their claims that the summonses are improper. I express no opinion with respect to the merits of the petitioners' and intervenors' claims. The respondent's motions to dismiss these petitions for lack of subject matter jurisdiction will be granted.

Order accordingly.

END OF DOCUMENT

APPENDIX D

26 U.S.C. § 6050I

§ 6050I. Returns relating to cash received in trade or business.

(a) **Cash receipts of more than $10,000.** Any person --

(1) who is engaged in a trade or business, and

(2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),

shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

(b) **Form and manner of returns.** A return is described in this subsection if such return -

(1) is in such form as the Secretary may prescribe,

(2) contains --

(A) the name, address, and TIN of the person from whom the cash was received,

(B) the amount of cash received,

(C) the date and nature of the transaction, and

(D) such other information as the Secretary may prescribe.

(c) **Exceptions. (1) Cash received by financial institutions.** Subsection (a) shall not apply to --

(A) cash received in a transaction reported under title 31, United States Code, if the Secretary determines that reporting under this section would duplicate the

reporting to the Treasury under title 31, United States Code, or

(B) cash received by any financial institution (as defined in subparagraphs (A), (B), (C), (D), (E), (F), (G), (J), (K), (R), and (S) of section 5312(a)(2) of title 31, United States Code).

(2) **Transactions occurring outside the United States.** Except to the extent provided in regulations prescribed by the Secretary, subsection (a) shall not apply to any transaction if the entire transaction occurs outside the United States.

(d) **Cash includes foreign currency and certain monetary instruments.** For purposes of this section, the term 'cash' includes --

(1) foreign currency, and

(2) to the extent provided in regulations prescribed by the Secretary, any monetary instrument (whether or not in bearer form) with a face amount of not more than $10,000.

Paragraph (2) shall not apply to any check drawn on the account of the writer in a financial institution referred to in subsection (c)(1)(B).

(e) **Statements to be furnished to persons with respect to whom information is required.** Every person required to make a return under subsection (a) shall furnish to each person whose name is required to be set forth in such return a written statement showing --

(1) the name and address of the person required to make such return, and

(2) the aggregate amount of cash described in subsection (a) received by the person required to make such return.

The written statement required under the preceding sentence shall be furnished to the person on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.

(f) **Structuring transaction to evade reporting requirements prohibited. (1) In general.** No person shall for the purpose of evading the return requirements of this section --

(A) cause or attempt to cause a trade or business to fail to file a return required under this section,

(B) cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact, or

(C) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more trades or businesses.

(2) **Penalties.** A person violating paragraph (1) of this subsection shall be subject to the same civil and criminal sanctions applicable to a person which fails to file or completes a false or incorrect return under this section.

26 U.S.C. § 7609

§ 7609. Special procedures for third-party summonses.

(a) Notice. (1) In general. If --

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice. Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in

the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) **Third-party recordkeeper defined.** For purposes of this subsection, the term 'third-party recordkeeper' means --

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));

(E) any attorney;

(F) any accountant;

(G) any barter exchange (as defined in section 6045(c)(3)); and

(H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof.

(4) **Exceptions.** Paragraph (1) shall not apply to any summons --

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) **Nature of summons.** Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) **Right to intervene; right to proceeding to quash.** (1) **Intervention.** Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) **Proceeding to quash.** (A) In general. Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary. If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention; etc. Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) **Summons to which section applies. (1) In general.** Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602(a) or under section 6420(e)(2), 6421(g)(2), or 6427(j)(2) and requires the production of records.

(2) **Exceptions.** A summons shall not be treated as described in this subsection if --

(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection (a)(3)(A), or

(B) it is in aid of the collection of --

(i) the liability of any person against whom an assessment has been made or judgment rendered, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) **Records; certain related testimony.** For purposes of this section --

(A) the term 'records' included books, papers, or other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

(d) **Restriction on examination of records.** No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made --

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) **Suspension of statute of limitations. (1) Subsection (b) action.** If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 5601 (relating to the assessment and

collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) **Suspension after 6 months of service of summons.** In the absence of the resolution of the third-party recordkeeper's response to the summons described in subsection (c), or the summoned party's response to a summons described in subsection (f), the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period --

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) **Additional requirement in the case of a John Doe summons.** Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that --

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained form the examination of the records (and the identity of the person or persons with respect to whose

liability the summons is issued) is not readily available form other sources.

(g) Special exception for certain summonses. In the case of any summons described in subsection (c), the provisions of subsections (a)(1) and (b) shall not apply if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of District Court; etc. (1) Jurisdiction. The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsection (f) and (g). The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of third-party recordkeeper and summoned party. (1) Recordkeeper must assemble records and be prepared to produce records. On receipt of a summons described in subsection (c), the third-party recordkeeper shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) **Secretary may give recordkeeper certificate.** The Secretary may issue a certificate to the third-party recordkeeper that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) **Protection for recordkeeper who discloses.** Any third-party recordkeeper, or agent or employee thereof, making a disclosure of records pursuant to this section in good-faith reliance on the certificate of the Secretary or an order of a court requiring production of records shall not be liable to any customer or other person for such disclosure.

(4) **Notice of suspension of statute of limitations in the case of a John Doe summons.** In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the summoned party shall provide notice of such suspension to any person described in subsection (f).

APPENDIX E

FORM 8300

Form **8300**

(Rev. February 1992)

Department of the Treasury
Internal Revenue Service

Report of Cash Payments Over $10,000 Received In a Trade or Business

Failure to file this form or filing a false form may result in imprisonment.

▶ **See instructions.**

Please type or print.

OMB No. 1545-0892
Expires 09-30-94

1 Check appropriate boxes if: a ☐ amends prior report; b ☐ suspicious transaction.

Part I Identity of Individual From Whom the Cash Was Received

2 If more than one individual is involved, see instructions and check here ▶ ☐

3 Last name	4 First name	5 Middle initial	6 Social security number
7 Address (number, street, and apt. or suite no.)		8 Occupation, profession, or business	
9 City	10 State / 11 ZIP code / 12 Country (if not U.S.)		13 Date of birth (see instructions)

14 Method used to verify identity: a Describe identification ▶
b Issued by c Number

Part II Person (See Definitions) on Whose Behalf This Transaction Was Conducted

15 If this transaction was conducted on behalf of more than one person, see instructions and check here ▶ ☐

16 This person is an: ☐ individual or ☐ organization 17 If funded by another party, see instructions and check here ▶ ☐

18 Individual's last name or Organization's name	19 First name	20 Middle initial	21 Social security number
22 Doing business as (DBA) name (see instructions)			Employer identification number
23 Alien identification: a Describe identification ▶ b Issued by c Number			
24 Address (number, street, and apt. or suite no.)		25 Occupation, profession, or business	
26 City	27 State / 28 ZIP code / 29 Country (if not U.S.)		30 Date of birth (see instructions)

Part III Description of Transaction and Method of Payment

31a ☐ personal property purchased d ☐ business services provided g ☐ exchange of cash
b ☐ real property purchased e ☐ intangible property purchased h ☐ escrow or trust funds
c ☐ personal services provided f ☐ debt obligations paid i ☐ other (specify) ▶

32 Specific description of property or service purchased. Give serial or registration number of car, boat, airplane, etc., address of real estate, etc.

33 Total price $ .00	34 Amount of U.S. currency received $ .00	35 Amount in $100 bills or larger $ .00

36a Amount of cash received in other than U.S. currency (see instructions) $ .00
b Specific description of cash received in other than U.S. currency

37 If part of an installment sale, give information below and check box ▶ ☐ 38 Date of transaction
a Number of payments
b Amount of each payment $ .00
c Frequency: ☐ monthly ☐ other (describe)
d Balloon payment (amount) $ .00

Part IV Business Reporting This Transaction

39 Name of reporting business	40 Employer identification number
41 Street address (number and street) where transaction occurred	Social security number

42 City	43 State / 44 ZIP code	45 Nature of your business

46 Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

Sign Here

(Authorized signature–See instructions) (Type or print signer's name below)	(Title)	(Date signed)	( ) (Telephone number of business)

FORM 8300

Multiple Parties

(Complete applicable parts below if box 2 or 15 on page 1 is checked)

Part I **Continued—Complete if box 2 on page 1 is checked**

3 Last name	4 First name	5 Middle initial	6 Social security number
7 Address (number, street, and apt. or suite no.)		8 Occupation, profession, or business	
9 City	10 State / 11 ZIP code / 12 Country (if not U.S.)		13 Date of birth (see instructions)
14 Method used to verify identity: a Describe identification ▶			
b Issued by		c Number	

3 Last name	4 First name	5 Middle initial	6 Social security number
7 Address (number, street, and apt. or suite no.)		8 Occupation, profession, or business	
9 City	10 State / 11 ZIP code / 12 Country (if not U.S.)		13 Date of birth (see instructions)
14 Method used to verify identity: a Describe identification ▶			
b Issued by		c Number	

Part II **Continued—Complete if box 15 on page 1 is checked**

16 This person is an: ☐ individual or ☐ organization	17 If funded by another party, see instructions and check here ▶ ☐		
18 Individual's last name or Organization's name	19 First name	20 Middle initial	21 Social security number / Employer identification number
22 Doing business as (DBA) name (see instructions)			
23 Alien identification: a Describe identification ▶			
b Issued by	c Number		
24 Address (number, street, and apt. or suite no.)		25 Occupation, profession, or business	
26 City	27 State / 28 ZIP code / 29 Country (if not U.S.)		30 Date of birth (see instructions)

16 This person is an: ☐ individual or ☐ organization	17 If funded by another party, see instructions and check here ▶ ☐		
18 Individual's last name or Organization's name	19 First name	20 Middle initial	21 Social security number / Employer identification number
22 Doing business as (DBA) name (see instructions)			
23 Alien identification: a Describe identification ▶			
b Issued by	c Number		
24 Address (number, street, and apt. or suite no.)		25 Occupation, profession, or business	
26 City	27 State / 28 ZIP code / 29 Country (if not U.S.)		30 Date of birth (see instructions)

FORM 8300

Paperwork Reduction Act Notice. - The requested information is useful in criminal, tax, and regulatory investigations, for instance by directing the Federal Government's attention to unusual or questionable transactions. Trades or businesses are required to provide the information under 26 U.S.C. 6050I.

The time needed to complete this form will vary depending on individual circumstances. The estimated average time is 27 minutes. If you have comments concerning the accuracy of this time estimate or suggestions for making this form more simple, you can write to both the **Internal Revenue Service**, Washington, DC 20224, Attention: IRS Reports Clearance Officer T:FP, and the **Office of Management and Budget**, Paperwork Reduction Project (1545-0892), Washington, DC 20503. DO NOT send this form to either of these offices. Instead, see **When and Where To File** below.

CHANGES YOU SHOULD NOTE

Section 6050I of the Internal Revenue Code was revised by the Revenue Act of 1990 to provide that, to the extent provided by the regulations, the term "cash" includes any monetary instrument, whether or not in bearer form, with a face amount of not more than $10,000 (other than certain checks). The regulatory change in the definition of cash is effective for cash amounts received on or after 02/03/92. See the **Definitions** section of these instructions and Regulations section 1.6050I-1 for more details.

GENERAL INSTRUCTIONS

Who Must File.—Each person engaged in a trade or business who, during that trade or business, receives more

than $10,000 in cash in one transaction or two or more related transactions, must file Form 8300. Any transactions conducted between a payer (or its agent) and the recipient in a 24-hour period are related transactions. Transactions are considered related even if they occur over a period of more than 24 hours if the recipient knows, or has reason to know, that each transaction is one of a series of connected transactions. This form may be filed voluntarily for any suspicious transaction (see **Definitions**), even if it does not exceed $10,000.

Multiple Payments.—How and when you must report receipt of cash deposits, cash installment payments, or other similar payments or prepayments depend on the dollar amounts of the initial and subsequent payments.

If the initial payment exceeds $10,000, it must be reported within 15 days. If the initial payment does not exceed $10,000, the recipient must add the initial payment and subsequent payments made within 1 year. When the total exceeds $10,000, you must file Form 8300 within 15 days. If subsequent payments, alone or combined, received within any 1-year period exceed $10,000, they must be reported separately within 15 days of the date they exceed $10,000 if they have not been previously reported. (If more than one report is required to be filed within a 15-day period, a single, combined report may be filed instead. The combined report must be filed no later than the due date for filing the first report.) If subsequent payments, alone or combined, received within 1 year do not exceed $10,000, they need not be reported.

Exceptions.—Regulations section 1.6050I-1 provides for exceptions to the reporting requirements, including:

(1) Financial institutions required to file **Form 4789**, Currency Transaction Report, are exempt from filing Form 8300 for the same transaction.

(2) Casinos required to file (or exempt from filing) **Form 8362**, Currency Transaction Report by Casinos, are exempt from filing Form 8300 for the same transaction. However, nongaming businesses (such as shops, restaurants, and hotels) at the casinos must report on Form 8300 receipt of cash in excess of $10,000.

(3) Cash received by a person other than in the person's trade or business is not reportable.

(4) Cash transactions that occur entirely outside the United States are generally exempt from the reporting requirements. The United States includes the 50 states and the District of Columbia. However, if any part of the transaction occurs in Puerto Rico, or a possession or territory of the United States, and the recipient is subject to the general jurisdiction of the IRS under the Internal Revenue Code, the transaction must be reported by the recipient.

(5) An agent who: (a) receives cash from a principal, (b) uses all of the cash within 15 days in a cash transaction that is reportable on Form 8300 or 4789, and (c) discloses all the information necessary to complete Part II of Form 8300 to the recipient of the cash in the second transaction, does not have to file Form 8300 for the initial receipt of the cash.

and Where To File.—File this form by the 15th day
e date of the transaction with the **Internal Revenue**
Detroit Computing Center, P.O. Box 32621,

Detroit, MI 48232, or hand carry it to your local IRS office. Keep a copy of each Form 8300 for 5 years from the date you file it.

Penalties. —Civil and criminal penalties, including up to 5 years imprisonment, are provided for failure (or causing the failure) to file a report, for filing (or causing the filing) of a false or fraudulent report, and for structuring a transaction.

Statement To Be Provided.— You must provide a written statement to each person named in Form 8300 on or before January 31 of the year following the calendar year in which the cash is received. The statement must show the name and address of the business, the total amount of reportable cash received, and that the information was furnished to the IRS. Keep a copy for your records.

Definitions

Person.—The term person means an individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, or other unincorporated organization or group, and all entities treated as legal personalities, including organizations that are exempt from tax.

Recipient.—The term recipient generally means the person receiving the cash. Each store, division, branch, department, headquarters, or office ("branch") (regardless of the physical location) comprising a portion of a person's trade or business shall be a separate recipient. However, a branch will not be considered a separate recipient if the branch (or a central unit linking such branch with other branches) would in the ordinary course of business have reason to know the identity of payers making cash payments to other branches of such person's trade or business.

Transaction.—The term transaction includes (but is not limited to) the purchase of goods, services, personal or real property, and intangible property by a customer; a debt obligation paid for with cash; the receipt and conversion of cash to a negotiable instrument (e.g., a receipt of cash from a person in exchange for a check); and the receipt of cash to be held in escrow or trust.

Cash—Amounts received before 02/03/92.—The term cash means the coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued.

Cash—Amounts received on or after 02/03/92.—The term cash means, in addition to the above definition, a cashier's check, bank draft, traveler's check, or money order having a face amount of not more than $10,000 received in a Designated Reporting Transaction as defined below, or received in any transaction in which the recipient knows that such instrument is being used in an attempt to avoid the reporting of the transaction under section 6050I.

Designated Reporting Transaction.—A designated reporting transaction is a retail sale (or the receipt of funds by a broker or other intermediary in connection with a retail sale) of:

- *A consumer durable*, which is an item of tangible personal property of a type suitable under ordinary usage for personal consumption or use that can reasonably be expected to be useful for at least 1 year under ordinary usage, and that has a sales price of more than $10,000.
- *A collectible*, which is any work of art, rug, antique, metal, gem, stamp, or coin as described in section 408(m)(2)(A) through (D) without regard to section 408(m)(3).
- *A travel or entertainment activity*, which is an item of travel or entertainment that pertains to a single trip or event

if the combined sales price of the item and all other items relating to the same trip or event that are sold in the same transaction (or related transactions) exceeds $10,000.

Retail Sale.—The term retail sale means any sale (whether or not the sale is for resale or for any other purpose) made in the course of a trade or business if that trade or business principally consists of making sales to ultimate consumers.

Exceptions.—Unless the recipient knows that it is being used in an attempt to avoid the reporting of the transaction, a cashier's check, bank draft, traveler's check, or money order received in a designated reporting transaction is not treated as cash if—

• The instrument constitutes the proceeds of a loan from a bank (as defined in 31 CFR 103). The recipient may rely on a copy of the loan document, a written statement from the bank, or similar documentation (such as a written lien instruction from the issuer of the instrument) to substantiate that the instrument constitutes loan proceeds.

• The instrument is received in payment on a promissory note or an installment sales contract (including a lease that is considered a sale for Federal income tax purposes). However, the exception only applies if the notes or contracts with the same or substantially similar terms are used in the ordinary course of your trade or business in connection with sales to the ultimate consumers and the total amount of payments on the note or contract that are received on or before the 60th day after the date of the sale does not exceed 50% of the purchase price.

• The instrument is received under payment plans requiring one or more down payments and the payment of the balance of the purchase price by the time of the sale (in the case of

an item of travel or entertainment, the earliest date that any item of travel or entertainment pertaining to the same trip or event is furnished). However, this only applies if you use plans with the same or substantially similar terms in the ordinary course of your trade or business in connection with sales to ultimate consumers; and the instrument is received more than 60 days before the date of sale (in the case of an item of travel or entertainment, the date the final payment is due).

Suspicious Transaction.—The item suspicious transaction means a transaction in which it appears that a person is attempting to cause Form 8300 not to be filed, or a false or incomplete form to be filed, or where there is an indication of possible illegal activity.

SPECIFIC INSTRUCTIONS

Complete all parts. Skip Part II if the individual in Part I is conducting the transaction on his or her behalf only.

Item 1.—If you are reporting a suspicious transaction (See **Definitions**) , check box 1b. For a suspicious transaction, you are also encouraged to telephone the local Internal Revenue Service Criminal Investigation Division. If you do not know the number, please call toll-free 1-800-800-2877

Part I

Item 2.—If two or more individuals conducted the transaction you are reporting, check the box and complete Part 1 on any one of the individuals. Provide the same information on the other individual(s) on the back of the form. If more than three individuals are involved, provide the same information on additional sheets of paper and attach them to this form.

Item 6.—Enter the social security number of the individual named. If the individual has no number, enter "None."

Item 8.—Use fully descriptive terms such as plumber or attorney, and not nondescriptive terms such as merchant, businessman, or self-employed.

Item 13.—Enter six numerals for the date of birth of the individual named. For example, if the individual's birth date was July 6, 1960, enter 07 06 60.

Item 14.—You must verify the name and address of the individual identified. Verification must be made by examination of a document normally acceptable as a means of identification when cashing checks (for example, a driver's license, passport, or other official document). In Item 14a, enter the type of document used to verify the identification. In Item 14b, identify the issuer of that document. In item 14c, enter the document's number. For example, if the individual has a Utah driver's license, enter "driver's license" in item 14a, "Utah" in item 14b, and its number in item 14c.

Part II

Item 15.—If the transaction is being conducted on behalf of more than one person (for example, if the individual in Part I is buying a vehicle on behalf of two persons), check the box and complete Part II on any one of the persons. Provide the same information requested in Part II on the other person(s) on the back of the form. If more than three persons are involved, provide the same information on additional sheets of paper and attach them to this form.

Item 16.—If the person named is an individual, check the "individual" box. For any person other than an individual,

check the "organization" box. Check both boxes if the transaction is on behalf of both an individual and an organization.

Item 17.—Check the box if any of the cash received is from a party or parties not identified in Part I or II. Provide the same information on that party or parties on additional sheets of paper and attach them to this form.

Item 18 through 21.—If the person on whose behalf the transaction was conducted is an individual, complete items 18, 19, 20. Enter his or her social security number (SSN) in item 21 (enter "None" if the person does not have one). If the individual is a sole proprietor and has an employer identification number (EIN), enter both the SSN and EIN in item 21. If he or she does not have an EIN, enter "None" in item 21.

Item 22.—If a sole proprietor or other organization named in items 18-20 is doing business as (DBA) under a name other than that entered in items 18-20 enter the DBA name here.

Item 23.—If the person is an alien without an SSN, complete this item. Enter a general description of the type of official document issued to that person in item 23a (e.g., "passport"), the country that issued the document in item 23b, and the document's number in item 23c.

Item 30.—See item 13 instructions.

Part III

Item 31.—Check the appropriate box(es) that describe the transaction. If the transaction is not specified in boxes a-h, check box i and briefly describe it (e.g., car lease).

Items 33 through 36b.—Provide the total price of the goods purchased, services provided, amount of cash exchanged, etc. (e.g., the total cost of a vehicle purchased, cost of catering service, exchange of currency) in item 33. Enter the total amount of U.S. currency received reportable on this return (see **Multiple Payments** for reporting requirements) in item 34 and the amount of $100 (and larger bills in item 35). Show only nearest dollar amounts. Round 50 cents or more to the next whole dollar.

Enter in item 36a the amount of all cashier's check(s), bank draft(s), traveler's check(s), and/or money order(s) each having a face amount of not more than $10,000 and any currency and/or coin of another country received. See the definitions of **Cash**. Provide a specific description of these items in 36b. This should include the name of the issuer, date issued, amount and number of each cashier's check, bank draft, traveler's check, and/or money order plus the country of issuance and amount (in U.S. dollar equivalent) of any currency and/or coin of another country. If more space is required enter the information required by item 36b on additional sheets of paper and attach them to this form.

Item 37.—If the transaction is part of an installment sale, check the box in item 37a, enter the number of payments agreed upon; in item 37b, enter the amount of each installment payment; in item 37c, check the "monthly" box if the payments are to be made monthly, or the "other" box if the payments are made at any other intervals and describe the intervals (e.g. weekly or semi-annually). If the installments are for different amounts, attach a schedule.

Item 38.—If the combined amount of cash received in two or more installment payments exceeds $10,000, enter the payment date that causes the combined amount to exceed $10,000. Also, see **Multiple Payments.**

Part IV

Item 40.—Enter the EIN of the reporting business. Enter your SSN only if your business has no EIN.

Item 45.—Describe the nature of the business filing the report. Use descriptive terms (auto dealer, jewelry dealer) rather than nondescriptive terms (business, store).

Item 46.—This report must be signed by an authorized individual. Also, type or print the name of the signer below the signature and enter the telephone number of the business filing the report.

APPENDIX F

Department of the Treasury
Internal Revenue Service
Public Affairs Division
Washington,DC 20224 NEWS

For Release 12-7-93
IR-93-113

IRS SEEKS GREATER COMPLIANCE WITH
FORM 8300 REQUIREMENTS

Washington -- Concerned about the lack of compliance with Form 8300, Report of Cash Transactions Received in a Trade of Business, reporting requirements by attorneys, the Internal Revenue Service announced today that it will begin assessing the intentional disregard penalty against certain attorneys. This is part of its on-going effort to enhance Form 8300 compliance by attorneys who either fail to file the form or file an incomplete one.

The law requires any person engaged in a trade or business who receives more than $10,000 in cash in any one transaction, or two or more related transactions, to report the transaction to the IRS within 15 days of receipt of the cash on Form 8300. The law also requires that a properly filed Form 8300 contains the correct cash payer's name, address and tax identification number, as well as the amount of cash received and the date and nature of the transaction.

While filings of Form 8300 have increased ten-fold since 1987 -- from 13,900 cash transaction reports in that year, to 142,000 in 1992 and over 105,000 so far in 1993 — a substantial number of attorneys who accept cash fees in excess of $10,000 have filed, and continue to file, incomplete Forms 8300.

Despite repeated guidance to the contrary since 1987, including a specific regulatory requirement applicable to attorneys, many attorneys rely on the attorney-client privilege for not disclosing client-identifying information on the form. Two recent court decisions, however, support the IRS' position that client identifying information required on Form 8300 is not privileged: United States v. Goldberger & Dubin, P.C. and United States v. Leventhal.

The information from the Forms 8300 is added to a data base at the IRS Detroit Computing Center for use in civil and criminal law enforcement and tax administration purposes. IRS personnel around the country can use this information in their examination, collection and criminal investigation work. The data helps detect nonfiling, unreported income, and money laundering often associated with narcotic trafficking and other illegal activities by some of the customers and clients of the businesses required to file.

According to Donald X. Vogel, Assistant Commissioner, Criminal Investigation, "Forms 8300 are a valuable tool for the IRS because they produce a paper trail which often links individuals with their money."

The IRS may assess civil penalties against a person who fails to file Form 8300 or who fails to file a complete Form 8300. When the failure is due to intentional disregard of the cash reporting requirements, the amount of the penalty IRS may impose is the greater of $25,000 or the amount of cash received in each transaction, not to exceed $100,000.

In FY 1992, in 392 cases IRS assessed $2.6 million in penalties for intentional disregard. In FY 1993, there were 1,034 cases and $1.7 million in penalties. The high

1992 dollar amount is the result of concentrated compliance checks in various industries such as car dealers, boat dealers, furriers and jewelers.

Before now imposing the intentional disregard penalty on attorneys, the IRS had pursued many avenues to encourage full compliance with cash reporting requirements by attorneys. These efforts included serving summonses and sending notices that Form 8300 information is not privileged and the intentional disregard penalty may be imposed.

X X X

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

FEB 23 1994

The Honorable Michael J. Kopetski
House of Representatives
Washington, DC 20515

Re: Attorneys and I.R.C. §6050I

Dear Representative Kopetski:

I have been asked to respond to your letter of January 18, 1994, to the Commissioner of Internal Revenue regarding your concerns about the application of the cash reporting requirements of I.R.C. § 6050I to attorneys.

Congress enacted section 6050I as part of the Deficit Reduction Act of 1984. It currently requires any person who is engaged in a trade or business, and who, in the course of such trade or business, receives more than $10,000 in cash in one or more related transactions, to file a return (Form 8300) with respect to such transaction within 15 days of the transaction. The information required to be reported includes the name, address, and taxpayer identification number of the person from whom the cash was received, the amount of cash received, and the date and nature of the transaction. I. R. C. § 6050I(b). Congress enacted section 6050I to provide the Internal Revenue Service with the ability to identify taxpayers with substantial cash incomes as a means to contend with enormous amounts of unreported taxable income. S. Rep. No. 300, 98th Cong., 1st Sess. 121 (1984).

The penalty for negligent failures to comply with section 6050I is $50 per return. The penalty amount is significantly enhanced when a person intentionally disregards the requirements of section 6050I. "Intentional disregard occurs when a [person] who knows or should know of a rule or regulation chooses to ignore its requirements." Hansen v. Commissioner, 820 F.2d 1464, 1469 (9th Cir. 1987). The intentional disregard penalty was increased by the Omnibus Budget Reconciliation Act of 1990 from the greater of $100 or 10 percent of the amount of cash required to be reported, to the greater of $25,000 or the amount of cash required to be reported in the transaction up to $100,000 per return. This increase signified Congress' seriousness about full and timely compliance with section 6050I, and its intent that section 6050I complement the money laundering provisions of the Bank Secrecy Act. H.R. Conf. Rep. 101-964, 101st Cong., 2d Sess. 1084 (1990).

The Internal Revenue Service's objective is to uniformly administer section 6050I with respect to all persons who come within its parameters, including attorneys, commensurate with the desires of Congress. To this end, we note section 6050I contains no exemptions for attorneys, and that they are subject to the civil and criminal penalties designed to insure compliance, as are all other trades or businesses, United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 506 (2d Cir. 1991). Treasury's regulations specifically require attorneys who represent clients for cash fees in excess of $10,000 to comply with section 6050I. See Treas. Reg. § 1.6050I-1(c) (7) (iii) Ex. 2. Excepting attorneys from section 6050I by the Service would be contrary to equitable and effective tax administration and the express desires of Congress.

The Service has been successful in compelling attorneys to disclose client identifying information required

by section 6050I through summons enforcement proceedings. See United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991) (rejecting Fourth, Fifth, and Sixth Amendment, and attorney-client privilege challenges to section 6050I); United States v. Leventhal, 961 F.2d 936 (11th Cir. 1992) (following Goldberger); United States v. Garland, 92-1 USTC ¶ 50,218 (N.D. Ga.); United States v. Ritchie, No. 92-6393 (6th Cir. Feb. 3, 1994). However, despite the success with summons enforcement, attorneys continue to represent a major compliance problem. More than half the attorneys filing Form 8300 during 1992 and 1993 filed the form incompletely.

Because summons enforcement is a slow and cumbersome method of achieving compliance, the Service, after consultation with the Department of Justice, has decided to proceed in asserting the intentional disregard penalty on a case by case basis against those attorneys who intentionally disregard the provisions of section 6050I. The Service has, for some time, notified attorneys of the filing requirements and that controlling Federal precedent does not recognize any privilege for refusing to comply with the requirements of section 6050I. Thereafter, those attorneys who continue to fail to comply with the law may be subject to the intentional disregard penalty.

The Service is aware that some attorneys are concerned as to their obligations not to disclose confidential client communications and that there may be "special or extraordinary circumstances", i.e., disclosure of the client's name is the "last link" incriminating the client, under which the information may be privileged. However, it is important to emphasize that not all circuits recognize this doctrine, and even those that do stress that "special circumstances" is the exception to the general rule that client identity and fee information are not privileged matters. See Goldberger, 935

F.2d at 505; Leventhal, 961 F.2d at 940; In re Grand Jury Matter No. 91-01386, 969 F.2d 995 (11th Cir. 1992); Ritchie at n.13 (rejecting the "last link" doctrine in the Sixth Circuit). With respect to compliance with section 6050I, the existence of special circumstances would be a rare and unusual occurrence, because "[n]o such "direct linkage" [between the disclosure and incrimination] is apparent in section 6050I." Goldberger, 935 F.2d at 505. Although the Service would seriously consider a bona fide claim of special circumstances evidenced by specific facts, the Service will not accept a blanket claim of privilege of "special circumstances", but must test each such claim for a sound basis in law and fact. The Service has established administrative procedures where such claims can be made and assessed.

For your information, members of the Internal Revenue Service, the Department of Justice Tax Division, and the National Association of Criminal Defense Lawyers met on January 6, 1994, to discuss these issues. No proposal was submitted by the NACDL which would permit the Service to proceed in a manner consistent with that required by law. However, we will continue to be receptive to further suggestions concerning the administration of section 6050I.

We hope this responds to your concerns. If we can be of further assistance, please contact us.

Sincerely,

/s/ Daniel J. Wiles
Daniel J. Wiles
Assistant Chief Counsel
(Field Service)

FLORIDA BAR PROFESSIONAL ETHICS COMMITTEE ADVISORY OPINION 92-5
Approved by Board of Governors 12/93

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented is the inquiring attorney's letter are as follows.

The attorney apparently refused to fully complete IRS Form 8300, "Reports of Cash Payments Over $10,000 Received in a Trade or Business," on the grounds that such information is confidential and/or privileged. The IRS, citing United States v. Leventhal, 961 F.2d 936 (11th Cir. 1992) and United States v. Goldberger, 935 F.2d 501 (2d Cir. 1991), rejected the attorney's claim of confidentiality and/or privilege and requested by letter that he provide the information within 30 days. The IRS letter indicates that failure to submit the requested information will result in the issuance of a summons. The attorney inquires about his ethical duty under the circumstances.

Rule 4-1.6 is the governing ethical standard. Section (a) of that rule states:

> A lawyer shall not reveal information relating to representation of a client except as stated in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client.

It seems clear that the information sought by the IRS on the 8300 form is information "relating to the representation of a client" and ordinarily, pursuant to the attorney's ethical duty of confidentiality, should not be voluntarily disclosed absent client consent.

There are times, however, when a lawyer is required or, alternatively, permitted to reveal otherwise confidential information. Section (b) of Rule 4-1.6, for example, requires such disclosure to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another. Section (e) of the rule sets forth certain situations when a lawyer may, but is not required to, reveal information relating to the representation of a client. None of the exceptions to the confidentiality rule appears to be implicated in the instant matter.

When information is sought from a lawyer pursuant to subpoena or, as in this case, by service of a summons, the legal issue of attorney-client privilege becomes relevant. (Whether a particular communication is protected by the evidentiary attorney-client privilege is a question of law that is beyond the authorized scope of an advisory ethics opinion. See Rule 2, Florida Bar Procedures for Ruling on Questions of Ethics.) The Comment to Rule 4-1.6 explains the relationship between the ethical obligation of confidentiality and the legal doctrine of attorney-client privilege:

> The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

> If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

In accordance with the above principles, an attorney who is required to complete IRS Form 8300 should initially decline to provide the requested confidential and/or privileged information, absent client consent, when the attorney files the form. If the attorney is then served with a facially sufficient summons, as the attorney was in Leventhal, the attorney must make a good faith attempt to determine whether the attorney-client or some other privilege might apply. In determining whether a privilege applies, all applicable law shall be considered by the attorney. If the attorney determines that a privilege might possibly apply, the attorney should assert it on the client's behalf. If a court subsequently finds that the asserted privilege does not apply and orders the attorney to provide the information, the attorney's ethical duty has been satisfied and the information may be revealed. The attorney may appeal the court's order if the attorney believes it is wrong, but the attorney is not required to do so. See Rule 4-1.6(d), Rules Regulating The Florida Bar.

If, on the other hand, after being served with a summons the attorney determines that no privileges are applicable, the attorney acts ethically in complying with the summons and providing the requested information. Again, any reasonable doubt about the applicability of a privilege (or other legally recognized reason for noncompliance) should be resolved in favor of the client.

RESOLUTION

WHEREAS, the Florida Bar has previously expressed its serious concern (through its Ethics Counsel and Staff Opinions TIC 07-008 issued September 4, 1986, TIC 08-017 issued August 10, 1987 and TIC 08-203 issued March 24, 1988) over the effect upon the attorney-client privilege and upon the confidentiality of the attorney-client relationship of Section 6050I of the Internal Revenue Code added by Section 146 of Title 1 of the Deficit Reduction Act of 1984, which requires disclosure of certain cash receipts in excess of $10,000; and

WHEREAS, the above-mentioned Staff Opinions having been repeatedly forwarded to the Internal Revenue Service by members of The Florida Bar in their good-faith effort to comply, insofar as ethically permitted with the reporting requirements of Section 6050I above referenced; and

WHEREAS, the Internal Revenue Service rather than addressing this issue in an effort to reach an agreement as to the manner in which a member of The Florida Bar could comply with said reporting requirements while preserving the ethical integrity demanded of a member of The Florida Bar (pursuant to Rule 4-1.6, Rules Regulating The Florida Bar), has refused to address this issue and instead has demanded that members of The Florida Bar provide information absent the consent of affected clients stating that "failure to voluntarily submit the requested information could result in summons enforcement action being initiated," thereby placing members of The Florida Bar in the untenable position of either violating their professional and ethical responsibilities, or incurring the risk of civil or criminal sanctions;

NOW THEREFORE BE IT RESOLVED that the Board of Governors of The Florida Bar urges the Internal Revenue Service, the Department of the Treasury and the Department of Justice to delay any effort, whether by the initiation of summons enforcement action, civil or criminal sanctions or threat of the same to compel members of The Florida Bar to broach their ethical obligation by disclosing confidential information until an appropriate solution to this problem can be devised; and

BE IT FURTHER RESOLVED that The Florida Bar be authorized and directed to work with officials of the Internal Revenue Service, the Department of the Treasury and the Department of Justice, and with the appropriate committees of the Congress of the United States in an effort to fashion appropriate exemptions from the disclosure requirements on Section 6050I above mentioned, so as to preserve the ethical integrity of members of The Florida Bar.

DATED this 17th day of November, 1989.

/s/ Stephan M. Zack
Stephen M. Zack, President
The Florida Bar

RESOLUTION

Whereas, The Florida Bar has previously expressed its serious concern (through its Ethics Counsel and Staff Opinion TEO 87-005 issued September 4, 1986, TEO 88-017 issued August 10, 1987, TEO 88-203 issued March 24, 1988 and Florida Ethics Opinion 99-5 issued December 7, 1993) over the effect upon client confidences, the attorney-client privilege and upon the confidentiality of the attorney-client relationship, of Section §6050I of the Internal Revenue Code added by Section 146 of Title 1 of the Deficit Reduction Act of 1984, which requires disclosure of client identifying information for certain cash receipts in excess of $10,000; and

Whereas, the above mentioned Staff Opinions having been repeatedly forwarded to the Internal Revenue Service by members of The Florida Bar in their good-faith effort to comply, insofar as ethically permitted, with the reporting requirements of Section 6050I above referenced; and

Whereas, the Criminal Law Section of The Florida Bar, composed of a fairly equal number of judges, law professors, prosecutors and defense lawyers, has previously stated its position in favor of Florida Ethics Opinion 92-5 and is in favor of the current resolution; and

Whereas, it is the position of The Florida Bar that those of its members who fail to disclose client identifying information on IRS Form 8300, as promulgated pursuant to Title 26 U.S.C. §6050I under the circumstances covered by Florida Bar Ethics Advisory Opinion 92-5 dated December 7, 1993 (and its predecessors) are acting under the compulsion thereof and, therefore, are not in "willful" violation of §6050I because compliance could mean discipline or disbarment. Moreover, The Florida Bar believes such

actions constitute "reasonable cause" within the meaning of 26 U.S.C. §6724(a) and under these circumstances, imposition of a fine upon Florida attorneys would be unfair.

Now Therefore Be It Resolved that the Board of Governors of The Florida Bar oppose enforcement of 26 U.S.C. §6050I (Form 8300) through civil penalty assessments against attorneys and urges the Internal Revenue Service, the Department of the Treasury and the Department of Justice to delay any effort, whether by the initiation of summons enforcement action, civil or criminal sanctions or threat of the same to compel members of The Florida Bar to breach their ethical obligation by disclosing confidential information until a mutually agreeable resolution to this problem can be devised; and

Be It Further Resolved that The Florida Bar be authorized and directed to work with officials of the Internal Revenue Service, the Department of the Treasury and the Department of Justice, and with the appropriate committees of the Congress of the United States in an effort to fashion workable solutions or appropriate exemptions from the disclosure requirements of Section 6050I above mentioned, so as to preserve the ethical integrity of members of The Florida Bar.

Dated this 2 day of June, 1994.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
President, The Florida Bar

WASHINGTON STATE BAR ASSOCIATION RESOLUTION IN SUPPORT OF MODIFICATION OF 26 U.S.C. §6050(I)

WHEREAS, 26 U.S.C. 6050(I) requires that all persons engaged in trade or business who, during that trade or business, receive more than $10,000 in cash in a transaction or related transactions file IRS Form 8300 disclosing the identity of the person(s) making the cash payment; and

WHEREAS, the Board of Governors of the Washington State Bar Association has adopted Formal Opinion number 189 which states that "A lawyer is obligated to comply with the requirements of federal law and regulations that IRS Form 8300 be filed under circumstances requiring it", but noting that the identity of a client is a "secret" as defined in the Rules of Professional Conduct; and

WHEREAS, a lawyer may not disclose client secrets except as permitted by RPC 1.6, which in pertinent part requires that disclosure only be made with client consent or pursuant to court order; and

WHEREAS, it appears that the United States Department of Justice has indicated its intent to attempt to enforce this law and regulation by seeking penalty assessments against lawyers who file incomplete forms; and

WHEREAS, legislation has been or will be introduced in the United States Congress amending 26 U.S.C. §6050(I) to exempt from this cash reporting requirement cash received by an attorney as payment for legal services performed by the attorney;

BE IT HEREBY RESOLVED that the Washington State Bar Association supports legislation which would exempt lawyers from reporting cash payments received as legal fees from the requirements of 26 U.S.C. §6050(I).

Adopted by the Board of Governors on June 17, 1994.

/s Paul L. Stritmatter
Paul L. Stritmatter, President

Attest: Dennis P. Harwick
Dennis P. Harwick, Executive Director

189
(1991)
Disclosure of Client Information
to Treasury Department on IRS Form 8300

Issues:

What is a lawyer's civil guide regarding compliance with the U.S. Treasury Department IRS Form 8300 which asks the disclosure of the identity of a client making cash payments of more than $10,000 to the lawyer as required by federal law and regulations?

Short Answer

A lawyer is obligated to comply with the requirements of federal law and regulations that IRS Form 8300 be filed under circumstances requiring it. However, the identity of a client paying more than $10,000 to a lawyer is a "secret" as defined in the Rules of Professional Conduct as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." As much, the attorney may not disclose identifying information except as permitted by RPC 1.6. Refusal to make such disclosure may result in the issuance of a summons to the lawyer; and the lawyer must properly respond to any efforts to enforce the summons.

Discussion:

Section 6050(I) of the Internal Revenue Code of 1986, as amended, requires that any person who is engaged in a trade or business and who, in the course of such trade or business, receives more than $10,000 in cash in one transaction or in two or more related transactions, must file

a return with the U.S. Treasury Department. The return, which is to be made on IRS Form 8300, requires various information about the cash transaction, including the name, address and tax identification number of the person from whom the cash was received.

It is our opinion that a lawyer must disclose to a client that if the client pays the lawyer more than $10,000 in cash, the lawyer must comply with the requirement that IRS Form 8300 be returned as required by law. However, the lawyer may not disclose to the Treasury Department, through the filing of Form 8300 or otherwise, any information pertinent to the client's identity without the informed consent of the client or pursuant to either circumstances permitting disclosure as specified in Rule 1.6 of the Rules of Professional Conduct.

RPC 1.6 provides in part that

> (a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in section (b).
>
> * * *
>
> (b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary
>
> (1) To prevent the client from committing a crime or
>
> (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct

by which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

* * *

"Confidence" is defined by the RPC Terminology Section as "information protected by the attorney-client privilege under applicable law." "Secrets" is defined as "other information gained in his professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." For a discussion of the distinction between "confidences" or "secret" as well as additional reasoning equally supportive of our conclusion herein, see Formal Opinion IRS (1991).

An assertion by a lawyer of the inability to disclose information on IRS Form 8300 because of the requirement of RPC 1.6 may result in the service of a summons upon the lawyer pursuant to 26 U.S.C. § 7602, seeking the withheld information. An IRS summons is not self-enforcing. United States district courts instead are authorized to produce a summons upon a proper showing. 28 U.S.C. §7402(b) and 7604.

If a summons is served upon a lawyer, the lawyer must continue to decline to disclose client confidences except in compliance with RPC 1.6. If the government then seeks enforcement of the summons through the federal courts, the lawyer must respond properly and litigate the issue of disclosure. If ordered to disclose by a judge, a lawyer may do so in compliance with RPC 1.6, which permits a lawyer to reveal client secrets to the extent the lawyer reasonably believes necessary "pursuant to court order."

THE SUPREME COURT OF OHIO

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

OFFICE OF SECRETARY

Opinion 90-04
Issued April 20, 1990

SYLLABUS: An attorney may not reveal the confidences and secrets of a client unless permitted under DR 4-101(C). An attorney whose client pays $10,000 or more in cash must inform the client of the IRS reporting requirement under 26 U.S.C. §6050I and the risks involved. An attorney may not reveal information which may damage or prejudice a client

OPINION: We have before us your request for an advisory opinion on whether a criminal defense attorney in Ohio may ethically disclose to the Internal Revenue Service, as required by 26 U.S.C. §6050I on Form 8300, information revealing the identity of the client who pays a cash fee in excess of $10,000 in one or more related transactions.

A criminal defense attorney who reports cash retainers and the client's identity without the client's consent, risks violating DR 4-101 and DR 7-101 of the Code of Professional Responsibility. An attorney must preserve the confidence and secrets of a client. Code of Professional Responsibility, DR 4-101. An attorney must also zealously represent a client's interest with undivided loyalty and do nothing to damage or prejudice a client. Code of Professional Responsibility DR 7-101. A criminal defense attorney who identifies clients on the IRS form may be subjecting the client to further investigation and the possibility of a conviction.

On the other hand, an attorney who fails to comply with the IRS regulations may be subjected to criminal and civil penalties. The common practice of criminal defense attorneys is to report the cash amounts received and withhold the client's identity until the reporting of such would no longer jeopardize the client. Fricker, Doing Time, 76 A.B.A.J. 24 (1990).

The IRS has sent out hundreds of letters to attorneys withholding clients' identities saying that the information must be disclosed and that enforcement action would be initiated. Id. The vast majority of those attorneys who received the IRS letter have declined on ethical, legal and constitutional grounds to include any information that would identify the client/payor or the circumstances of the payment. Wall Street Journal, Nov. 30, 1989, at 87, col. 1; N.Y. Times, March 9, 1990, at B1, col. 4. This Board has no authority to discuss the constitutional and legal issues enveloping this request. Gov. Bar R. V(2)(b).

The IRS letters were not sent with the advance knowledge or approval of the Department of Justice. The Tax Division of the Department of Justice has assured the National Association of Criminal Defense Lawyers that enforcement proceedings would not be authorized until the issue was thoroughly studied and discussed by the appropriate agencies. Letter from NACDL to Members (Nov. 14, 1989). The Justice Department has, however, initiated actions against two Manhattan law firms for not reporting detailed information about clients who pay their attorneys more than $10,000 in cash. Wall Street Journal, Nov. 30, 1989, at 87, Col. 1.

Disciplinary Rule 4-101 prohibits an attorney from revealing confidences and secrets which may be detrimental to the client, unless the client consents after full disclosure. An

attorney may reveal the information if permitted under the Disciplinary Rules, if required by law or court order, if the client intends to commit a crime, if the information is necessary to prevent a crime, or if the information is necessary to defend the attorney against accusations of wrongdoing. Code of Professional Responsibility, DR 4-101(C) (1)(2)(3)(4).

An attorney may file a completed Form 8300 relying on IRS regulations and DR 4-101(C)(2). However, "the protection of a client's confidences is so basic a tenet of professional responsibility that it yields only in the rarest of real dilemmas." Butler v. U.S., 414 A.26 844, at 849, (D.C. 1980). The justification for the strict rules on confidentiality is the desirability of complete candor between client and attorney.

Disclosing the client's identity on the IRS form may provide the last link in a chain of incriminating evidence that would lead to the client being charged with a crime. In our opinion, an attorney who reveals a client's identity on IRS Form 8300 would be violating the duty of confidentiality. In addition, DR 7-101(A)(3) provides that an attorney must not intentionally prejudice or damage a client during the course of the professional relationship. In our view, a criminal defense attorney must withhold a client's identity if the attorney believes in good faith the disclosure would jeopardize the client.

Criminal defense attorneys should inform their clients of the IRS filing requirement and the risks associated with disclosing the client's identity. The attorneys should further advise their clients that they may ultimately be compelled to reveal the information under federal law. The client must decide what confidential information, other than cash amounts, may be revealed. Code of Professional Responsibility, DR 4-101(C)(1).

Several state bar associations agree that client confidentiality extends to the IRS reporting requirements. Chicago Bar Assn. Op. 88-2 (1988); State Bar of Georgia Op. 41 (1994); District of Columbia Bar Op. 124 (1983); Kentucky Bar Assn. Op. E-253 (1981). Compare, Arizona Bar Assn. Op. 87-3 (1987) (if required by law, the attorney may fill out and file the form).

In conclusion it is our opinion and you are so advised that an attorney may not reveal the confidences or secrets of his or her clients except when permitted or required under DR 4-101(C). An attorney has the responsibility to reveal the IRS reporting requirements to the client who pays $10,000 or more in cash and the inherent risks involved. An attorney should not reveal information gained from a client when the revelation might jeopardize or damage the client.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.

OHIO STATE BAR ASSOCIATION

FEB 7 1994

January 27, 1994

Honorable John R. Kasich
U.S. House of Representatives
1173 Longworth House Office Building
Washington, D.C. 20515-3512

Dear Congressman Kasich:

I am writing to alert you to an urgent matter which has arisen regarding IRS enforcement of 26 USC Section 6050I. In a press release dated December 7, 1993 the IRS announced its intention to begin imposing substantial fines on attorneys who file Tax Form 8300 reporting the receipt of cash in excess of $10,000 but withhold the client-identifying information on the basis of lawyer-client privilege, ethical restrictions or other constitutional provisions. The IRS is now treating such filings as "willful violations" and has assessed fines of $25,000 on attorneys in New York, Florida and reportedly other jurisdictions.

This matter has been a subject of great concern to bar associations around the country. As you might imagine, the principal objection to the reporting requirements is that it poses the danger of turning defense counsel into instruments of the prosecution while failing to recognize the legal and ethical obligations owed to clients.

Until the IRS made its announcement in December, the Department of Justice (DOJ), to its credit, had been engaged in efforts to have the law clarified. Since September, 1990, in a policy set by then Acting Attorney General William Barr, the DOJ was involved in a case by

case exercise to determine the circumstances where attorneys may and may not be required to provide information concerning their clients. Specifically, the litigation had taken the form of IRS summons enforcement proceedings. To date, the litigation had reportedly achieved mixed results but progress was clearly being made.

Why the IRS chose, at this time, to abandon the process established by the DOJ is unclear. What is certain by its action is that the IRS is trying to coerce attorneys into compliance. This untimely and unexpected action also places attorneys in the unenviable and intolerable position of choosing between their ethical and legal duties to their clients and their concern for their own personal liability.

This unfortunate turn of events has made it necessary to bring this regrettable matter to your attention. The Ohio State Bar Association joins bar associations across the country in urging members of Congress to intervene at this time on the side of justice. We feel certain that positive results were forthcoming if the process set by the DOJ had been allowed to run its logical course. The IRS, by its arbitrary action, has breached that process. The Ohio State Bar Association respectfully requests your assistance at this time. Anything you can do to raise these concerns on our behalf would be greatly appreciated. Thank you for your attention to this matter.

Sincerely,

/s/ Kathleen B. Burke
Kathleen B. Burke
President

KBB:ba

cc: John Henry Hingson, III, Esquire
President, NACDL
Mark DeVan, Esquire
President, OACDL
Raymond R. Michalski, Esquire
H. Ritchey Hollenbaugh, Esquire
Denny L. Ramey, CAE
Albert L. Bell, Esquire
Max Kravitz, Esquire
William K. Weisenberg, Esquire

This letter was sent to the following members of the Ohio Congressional delegation:

U.S. House of Representatives

Honorable David L. Hobson
Honorable David Mann
Honorable Deborah Pryce
Honorable Douglas Applegate
Honorable Eric Fingerhut
Honorable James A. Traficant, Jr.
Honorable John A Boehner
Honorable John R. Kasich
Honorable Louis Stokes
Honorable Marcy Kaptur
Honorable Martin R. Hoke
Honorable Michael G. Oxley
Honorable Paul E. Gillmor
Honorable Ralph S. Regula
Honorable Rob Portman
Honorable Sherrod Brown
Honorable Ted Strickland
Honorable Tom Sawyer
Honorable Tony P. Hall

United States Senate:

Honorable Howard Metzenbaum
Honorable John H. Glenn

The District of Columbia Bar
1250 H. Street, N.W.
Sixth Floor
Washington, D.C. 20006-3906
Tel: (202) 737-4700
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Opinion No. 214

Disclosure to Internal Revenue Service of Name of Client Paying Fee in Cash

Applicable Code Provisions

• DR 4-101(B), Rule 1-6(a)(A Lawyer Shall Not Knowingly Reveal A Confidence or Secret of the Lawyer's Client Nor Use a Confidence or Secret of the Client to the Client's Disadvantage)

• DR 4-101(C)(3); Rule 1.6(d) A Lawyer May Reveal Confidences or Secrets When Permitted Under Disciplinary Rules or Required by Law or Court Order.)

This Inquiry raises an important issue concerning the confidentiality of client name requested to be disclosed under government reporting requirements.

Facts

The Inquirer, a law firm, represented a client in connection with drug related criminal charges to which the client has pleaded guilty, been sentenced and served his term of incarceration. In partial payment of the firm's outstanding bill for services, the client remitted in excess of $12,000 in cash. In accepting the cash payment, the firm explained to the client that the firm would be required to submit Form

8300, Report of Cash Payment Over $10,000 Received In a Trade or Business, to the Internal Revenue Service. At the client's insistence, the firm agreed to withhold the client's name from Form 8300. The firm advised the client, however, that the Internal Revenue Service might seek to compel disclosure of the client's name, and he agreed to accept financial responsibility for the firm's efforts in resisting disclosure. The client, however, still owes a substantial amount to the firm from its prior representation of him.

More than a year after submitting the required Form 8300, the firm was served with an administrative summons, directing the firm's managing partner to appear before an IRS Revenue Agent to give testimony and to produce for examination the following information relating to the Form 8300:

> The unredacted, unaltered, originals of all records retained to or associated with the attached Form(s) 8300 filed by you, including but not limited to recurring records, cash receipts journals, bank records, escrow account records, payment records, contracts, which contain the following information necessary to complete the attached Form(s) 8300:
>
> 1. The complete name(s), address(es), business or corporation(s) and social security or taxpayer's identification number(s) of any and all clients (whether individual(s) and/or organization(s) for whom the transaction(s) report were completed).

2. The complete name(s), address(es) and taxpayer identification number(s) of any and all individuals producing the reported transaction(s), if different from the information in item number 1.

3. The passport number(s) and country(ies) of origin and/or alien registration number(s) and country(ies) of origin for all foreign individual(s) or organization(s) who conducted the transaction(s) or for whom the transaction(s) was/were completed.

4. Any other identifying data for the individual(s) or organization(s) who conducted the transaction(s) or for whom the transaction(s) was/were conducted.

The firm has refused to comply with the summons pending the Committee's resolution of this Inquiry, which raises three questions:

1. Whether the firm is obligated pursuant to its ethical responsibilities to withhold from the IRS the client's identity notwithstanding the pending summons from the IRS?

2. If so, what is the extent of that obligation? Does it include an obligation to file an motion seeking to quash the summons, to be held in contempt, or to appeal any adverse decision by an IRS administrative tribunal or by a district court?

3. In what way, if any, does the client's failure to meet his financial obligations affect the firm's obligation to litigate these issues on his behalf?

Discussion

DR 4-101(B) of the Code of Professional Responsibility provides that a lawyer shall not knowingly "reveal a confidence or secret of his client." DR 4-101(C)(2) allows discretion of "[c]onfidence and secrets when permitted under Disciplinary Rules or required by law or court order." Similar rules apply under Rule 1.6 of the District of Columbia Rules of Professional Conduct (effective January 1, 1991).

In Opinion No. 180 (March 17, 1987), the Committee summarized its prior opinions relating to the disclosures of client information to governmental authorities stating "[t]he consistent rule we have followed is that, in the absence of on-going criminal activity, a lawyer may not voluntarily compromise the client's position." In Opinion No.99 (January 28, 1981), the Committee stated that where there is a "colorable basis" for asserting that statements made to an attorney are confidences or secrets protected from disclosure by DR 4-101, " the lawyer must resolve the question ... in favor of preserving the confidentiality of the disclosures." *Accord*: Opinion No. 186 (October 20, 1987).

Opinion No. 124 (March 22, 1983) involved facts similar to those presented here. In the course of a routine audit of a law firm's federal tax returns, the IRS auditor was provided a record of the firm's receipts with the clients' names deleted. The auditor then requested the firm to provide the clients' names. The firm had represented members of Congress under circumstances the disclosure of

which, the firm believed, could be damaging to the members' career. It requested guidance as to whether under these circumstances it could accede to the auditor's request.

The Committee held in Opinion No. 124 that "whenever a client request non-disclosure of the fact of representation, or circumstances suggest that such disclosure would embarrass or detrimentally affect any client, the fact of the firm's representation of that client is a client 'confidence' or 'secret' subject to the precedent accorded by the other provisions of Canon 4." The firm could not therefore voluntarily agree to the auditor's request. "Furthermore," the Committee held, "if the IRS does issue a summons, the inquirer's firm may not automatically comply with it. Rather, the firm remains under an ethical obligation to resist disclosure until either the consent of the client is obtained or the firm has exhausted available avenues of appeal with respect to the summons." Only after the firm is ordered by a court to disclose the names of its clients may it do so.

The client in this case has requested that the firm withhold his name from the Internal Revenue Service. Moreover, as in Opinion No. 124, disclosure of the client's name to the Internal Revenue Services could "embarrass or detrimentally affect" the client. [1] An important difference between this case and Opinion No. 174, however, is that the name of the firm's client is not sought under the IRS general authority to examine "relevant and material" books and records. *See* 26 U.S.C §7602(a)(1). Section 60.507 of the

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[1] The government, for example, may prosecute a taxpayer for failure to report income by demonstrating that the defendant's net worth is so substantial that it may be inferred that he or she received income that was not reported to the IRS. *E.g. Holland v. U.S.*, 348 U.S. 121 (1954); *United States v. Citron*, 783 F.2d 307 (2d Cir. 1986).

Internal Revenue Code, the statutory authority for Form 8300, is narrowly and specifically drawn to require disclosure of the names and other identifying information of persons making cash payments in excess of $10,000 received in the course of a trade or business. Civil and criminal penalties are available to enforce its provisions. *See* 26 U.S.C. §§6721, 6724(d) and 7203. Section 6050(I) is, therefore, a "law" which may justify disclosure of client confidences or secrets under DR 4-101(C)(2) in an appropriate case.

It does not necessarily follow that disclosure of the client's name is "required by" section 6050(I) in this case or other similar cases. Under the present state of the law, substantial good faith arguments exist as to whether law firms are a "trade or business" within the meaning of section 6050I[2] and whether Congress intended the statute to override traditional lawyer-client confidentiality.[3] Until these and any other questions regarding the coverage of section 6050(I) in a pertinent case are resolved definitively by the courts, our

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[2] The American Bar Association and other lawyers' organizations urged the IRS to include an exception for attorney's fees in the regulations issued under Section 6050I. The IRS refused. See 51 F.R. 31610 (September 4, 1986).

[3] The identity of an attorney's client and information regarding the payment of attorneys' fees generally are not protected from forced disclosure by the attorney-client privilege. *See, e.g. In re Semel*, 411 F.2d 195 (3rd Cir. 1959); *U.S. v, Finley*, 434 F.2d 595 (6th Cir. 1970); *In re Grand Jury Proceedings, (Rabin v. U.S.)*, 196 F.2d 1297 (11th Cir.,1990). Exceptions to this rule have been recognized, however, where the values promoted by the privilege outweigh the need for disclosure of the client's identity. *See, e.g. Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965); *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965) ; *In re Grand Jury Proceedings (U.S. v. Jones)*, 517 F.2d 666 (5th Cir. 1975); *In re Grand Jury Investigation No. 83-2-3* , 723 F.2d 447 (6th Cir. 1983).

prior opinions are clear that a firm may not generally disclose the name of its client on Form 8300 without the client's consent.[4] Furthermore, since the IRS' administrative summons is intended to obtain the information withheld from Form 8300, the firm may not voluntarily disclose the client's name in response to the summons.

Our prior Opinions also address the firm's second question regarding the extent of the duty to resist compelled disclosures of client confidences and secrets. In Opinion No. 14 (January 26, 1976) we were asked to define the extent of an attorney's duty to protect the confidentiality of a former client's records subpoenaed by a grand jury. We stated that "it is the lawyer's ethical duty to a former client to assert on the former client's behalf every objection or claim of privilege available to him when to do so might be prejudicial to the client." In Opinion No. 124, involving IRS, we stated that " the attorney must assert in the pending proceeding the client's interest in non-disclosure." *See also*, Opinion No. 99 (January 23, 1981) ("Inquirer's obligation is to assert before the grand jury the confidentiality of those statements"); Opinion No. 180 (absent the client's consent to disclosure, the attorney "must assert the confidentiality of the documents and information —"). Thus, if the IRS files an action to enforce its summons, the firm must assert the client's objections to disclosure.[5]

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[4] The Professional Responsibility Committee of the Chicago Bar Association has similarly concluded that an attorney should not reveal the name of a client to the IRS in Form 8300 because the application of the issue to attorneys is unclear. Dockett No. 56-2(5-11-88).

[5] In appearing and asserting the client's objections to disclosure, the firm is serving, in effect, as a witness in the proceeding. Whether the firm must go further and act as an advocate for the client's position will depend upon a number of circumstances including whether the client or former client has been notified of the proceeding and whether the client

Our prior Opinions are not entirely clear as to whether a lawyer who is ordered by a court to disclose client confidences or secrets may comply immediately with this order or must seek review of a higher court. In Opinion No. 124, we said with respect to an IRS subpoena that the firm could not comply until it had obtained its clients' consent or "exhausted available avenues of appeal with respect to the summons." It is not clear, however, whether the Committee intended the word "appeal" to mean a court's initial review of the agency's decision or a higher court's review of an initial judicial order. Our other opinions in this area suggest that the lawyer need not appeal an initial judicial order to a higher court, although he or she must allow the client an opportunity to do so. In Opinion No. 14, for example, we stated that "the attorney is free to comply with whatever directive the trial court gives." (Emphasis added.) In Opinion No. 83 we stated that an attorney "is not obliged to run the risk of being held in contempt of court because of the client's desire that confidences and secrets not be disclosed." And, in Opinion No. 180 we stated that "if attorney is ordered by a court to disclose the client information, he must not make disclosure until he has given *the client* an opportunity to appeal the order to a higher tribunal." (Emphasis added.)

The trend of our prior decisions is supported by the new Rules of Professional Conduct. Comment 26 to Rule 1.6 states:

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or former client has been able to retain separate counsel to advance his or her interest in the proceeding. Where the client or former client is made to participate because he or she is incarcerated, incapacitated or unable to afford separate counsel, the firm may have an obligation to act as an advocate for the client or former client.

> If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (d)(2) requires the lawyer to invoke the privilege when it is applicable. The lawyer may comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. But a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has practically made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to seek review independently of the firm.

In light of our prior decisions and Comment 26, we conclude that the law firm here may comply with a final judicial order enforcing an IRS summons without seeking appellate review of that order, but only after giving its client notice of the court's order and a reasonable opportunity to seek review independently of the firm.[6]

Finally, in response to the firm's third question, the fact that the client is in arrears in his payments to the firm does not relieve the firm of its basic ethical obligation to resist disclosure in response to the IRS summons. The Committee has consistently held that DR 4-101(C) prohibits disclosure of confidences and secrets of a former client. *See, e.g.*, Opinion Nos. 14, 58, 96, 99, 174, 175 180, 186. In none of these opinions was there any suggestion that the Committee envisioned that the lawyer would be compensated by the former client for his or her efforts in protecting

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[6] A duty to appeal the court may exist, however, where the client is unable to act. *See, supra note* 5.

against disclosure. Indeed, in two of our previous decisions, the client was currently represented by other counsel at the time that the information was demanded and we nevertheless found an obligation on the part of the former attorney to resist disclosure. *See*, Opinion Nos. 14, 83. The ethical obligation of lawyers to protect the confidences and secrets of their clients is not a matter of contract between the lawyer and client. The obligation arises because "confidentiality is essential to the role of the lawyer in the administration of justice," Opinion No. 180, and because, under Canon 1, every lawyer has a duty "to assist in maintaining the integrity and competence of the legal profession."[7]

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[7] It is possible that a lawyer may have an action against a current client or former client who refuses to pay for such services although having the means to do so, especially where, as here, the representation with respect to disclosure has previously been agreed to by the client. This is a question of law which is beyond the jurisdiction of this Committee.

Opinion No. 124

Canon 4, DR 4-101 — Disclosure of Client Identities to IRS Auditors

Synopsis

We have been asked whether an attorney ethically may disclose to an IRS auditor the names of clients represented by the attorney's firm. Under the facts presented, where the clients appear to desire continued confidentiality, DR 4-101 prohibits voluntary disclosure by the firm of the clients' identities without the clients' consent, because such disclosure would likely reveal "confidences" or "secrets" of those clients. However, DR 4-101 does not prohibit the inquiring attorney's firm from complying with a court order to disclose client identities, provided that the firm takes appropriate precautions to ensure that the clients' interest in nondisclosure are adequately presented to the court.

Facts

The Inquirer is an attorney whose firm is currently undergoing a routine Internal Revenue Service audit of its 1990 income tax returns. The firm has provided to the auditor records of the firm's receipts with client names deleted. However, in accordance with IRS guidelines, the auditor has requested disclosure of the names of the firm's clients, in order to determine whether any of those clients are political action organizations or politicians.

The Inquirer's firm has, during the pertinent time period, represented members of Congress under circumstances in which disclosure of that fact could damage the political careers of its congressional clients. In almost all

instances, the firm's representation of those clients never became a matter of public record. Accordingly, the inquirer asks what ethical obligations govern the firm's response to the auditor's request for disclosure of its clients' identities.

Specifically, the inquirer asks three questions:

(1) Are there any ethical obligations generally relating to the firm's voluntary disclosure of client names to the IRS appurtenant to an audit of the firm's income tax returns;

(2) Is the firm constrained or prohibited by any such ethical obligations from disclosing the firm's representation of public figures, particularly members of Congress; and

(3) What are the firm's ethical obligations with respect to compliance with a subpoena *duces tecum* if the IRS should issue one in an effort to learn the identities of the firm's clients?

Discussion

Disclosure of information obtained in the course of representing a client is governed by Canon 4, which requires a lawyer to preserve the confidences and secrets of a client. Ethical Consideration 4-1 identifies the purpose of this requirement to be the facilitation of full and frank discussions between the lawyer and the client. If the client knows that his or her confidences and secrets will be preserved by the lawyer, the client presumably will not withhold important information from the lawyer, and the quality of the lawyer's representation will, thereby, be improved.

Client "confidences" and "secrets" are defined by DR 4-101(A), which states:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secrets" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Although the terms "confidence" and "secret" customarily apply to information received from clients, there is no reason to conclude that they cannot also apply to the mere fact that a client is being represented by an attorney. DR 7-106(B)(2) suggests that client identities may constitute "confidences." Whether or not the mere act of representation can constitute a "confidence," however, if a client has requested that the fact of representation not be disclosed, or if such disclosure would embarrass or detrimentally affect the client, the fact of representation would itself fall within the definition of a "secret". Indeed, in Opinion No. 58, we strongly implied that the mere fact of representation, without more, could constitute a client "confidence" or "secret." See also ABA Informal Opinion No. 1237(1974) which found the identities of legal service clients to be "secrets" within the meaning DR 4.101(A). Moreover, even if the fact of representation were known by someone other than the attorney or the client, thereby destroying the confidentiality necessary to the attorney-client privilege, the fact of representation could still constitute a "secret" if the avoidance of additional disclosure was, nevertheless, desirable.

Under the facts of the present inquiry, it appears that at least some of the firm's clients have either requested that

the fact of their representation by the firm not be disclosed, or have retained the firm under circumstances in which such disclosure would adversely affect their interests. Although the inquiry suggests that some of the firm's congressional clients fall into this category, the definitions of "confidences" and "secrets" can encompass any of the firm's clients, whether they are public figures or not. Therefore, whenever a client requests non-disclosure of the fact of representation, or circumstances suggest that such disclosure would embarrass or detrimentally affect any client, the fact of the firm's representation of that client is a client "confidence" or "secret" subject to the protection accorded by the other provisions of Canon 4.

The remaining provisions of Canon 4 contain a general prohibition on the disclosure of client confidences or secrets, subject to certain exceptions. DR 4-101(B) and (C) state in pertinent part:

> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> ****
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. [Footnotes omitted]
>
> ****

Unless one of the enumerated exceptions applies, DR 4-101(B) prohibits the inquirer's firm from disclosing the identities of its clients to the IRS auditor where such disclosure could be contrary to the interests or the expressed desires of the clients. Moreover, the prohibition applies to the firm's former clients, as well as to its present clients. See E 4-6; Opinions No. 99, 96, 83 n.2, 58 and 14. Two exceptions to the prohibition on disclosure are potentially applicable.[1]

The first, contained in DR 4-101 (C)(1), permits disclosure after obtaining the consent of the affected clients. As we have previously indicated, such consent must be informed consent, given after the lawyer fully explains to the client the potential consequences of disclosure. See Opinions Nos. 99 and 72. Accordingly, the inquirer's firm may seek the informed consent of its affected clients to disclosure if the firm desires to do so, and may disclose the identities of those clients from whom such consent is obtained. However, because the exception enumerated in DR 4-101(C)(1) is permissive, rather than mandatory, the firm is not under any special obligation to seek the consent of its clients to disclosure.[2]

The second potentially applicable exception is contained in DR 4-101(C)(2), which permits disclosures of

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[1] Ethical Consideration 4.3 permits limited disclosure of information obtained from clients to outside agencies, such as bookkeepers and accountants, that provide services to the firm. However, this provision does not authorize disclosure to the IRS auditor under the facts presented where the IRS is not acting as agent of the firm. See Opinion No. 72, where we found that E.C. 4.3 was not intended to authorize disclosure to outside auditors.

[2] Any interest that the IRS has in determining whether the firms's clients would consent to disclosure can be protected in an action to enforce an IRS summons as is discussed below.

client "confidences" or "secrets" when required by law or court order. Accordingly, the IRS may issue a summons for any information contained in the firm's files if it genuinely desires access to such information. However, even if the IRS does issue a summons, that inquirer's firm may not automatically comply with it. Rather, the firm remains under an ethical obligation to resist disclosure until either the consent of the client is obtained or the firm has exhausted available avenues of appeal with respect to the summons.[3]

We have frequently considered the ethical obligations imposed upon an attorney against whom a proceeding to compel disclosure of client "confidence" or "secrets" is commenced, and have concluded that the attorney owes an obligation to the clients to resist disclosure. *See* Opinions No. 99, 83 and 14. If such a proceeding is commenced, the attorney is subject to two basic ethical obligations. First, the attorney must notify the affected clients of the pendency of the proceeding, so that the clients can take whatever steps they deem appropriate to protect their interests in nondisclosure. Second, unless the clients relieve the attorney from further obligations, the attorney must assist in the pending proceeding the clients' interest in nondisclosure.

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[3] The IRS is authorized to seek judicial enforcement of its summons when taxpayers do not voluntarily comply with IRS disclosure requests. See 26 U.S.C. §7602 *et seq.* The inquirer's firm can raise its objections to disclosure during such enforcement proceedings, as well as during any preliminary administrative proceedings that might be available. Once a judicial order compelling disclosure is obtained, however, DR 7-102(A)(3) appears to require the firm to comply with that court order. To the extent that the IRS may be authorized to deny summarily a taxpayer's claim where the taxpayer does not voluntarily comply with an IRS summons, or to take other actions that adversely affect the taxpayer, the firm may protect its interest by either obtaining the consent of its affected clients to disclosure or by itself seeking a judicial order denying the IRS access to the identities of its clients.

These ethical obligations are discussed in greater detail in Opinion No. 14. Moreover, as that opinion emphasizes, in making any of the determinations required under Canon 4, such as whether disclosure would adversity affect a client's interest, all doubts should be resolved in favor of the client.

Under the facts presented, if the IRS should issue a summons for records revealing client identities, the inquirer's firm should notify those affected clients who might possibly object to disclosure and in the absence of contrary instructions, should resist disclosure on behalf of those clients. If, after adequately assuring the clients' interest in nondisclosure and exhausting available appeals, the inquirer's firm is, nevertheless, ordered by a court to reveal the identities of its clients, the firm ethically must comply with the court order.

Conclusion

In light of the foregoing discussion, we answer the specific questions posed by the inquirer as follows:

(1) DR 4.101 prohibits voluntary disclosure to IRS auditors of the identities of a firm's clients where the clients have requested nondisclosure or where disclosure might adversely affect the interests of the clients;

(2) Where the clients object or might object to disclosure of their identities, the firm is ethically prohibited from voluntarily making such disclosure without the informed consent of the clients, whether or not the clients are public figures; and

(3) If confronted with an IRS summons, the firm should notify affected clients of the issuance of the summons and, in the absence of contrary instructions, should resist disclosure on behalf of its clients.

Inquiry No. 82-5-7
March 22, 1993

901:3201

Chicago

CHICAGO BAR ASSOCIATION

Opinions are issued by the Committee on Professional Responsibility of the Chicago Bar Association. Some opinions are published in the Chicago Bar Record. The association may be contacted at 99 S. LaSalla Street, Chicago, IL 60603. (312) 782-7348.

Opinion 36.2 (5/11/88) Confidentiality, Disclosure Form. A lawyer who is required to comply with the Internal Revenue Code's reporting requirement for each transaction exceeding $10,000 should not disclose the identity of his client or any circumstance surrounding fees paid for legal services when the information may allow the government to demonstrate that significant funds were within his client's control, which could be used as evidence of drug dealing and income tax evasion and the client has requested that the information be kept confidential. A substantial question exists regarding the application of the attorney-client privilege to the cash transaction reporting requirement and so the lawyer should test the applicability of the requirements before disclosing a client's confidences and secrets. The lawyer would not be condemned for reporting such information in reliance on the lack of exceptions for attorneys in the Internal Revenue Service's regulations; however, the better course of action is to file an IRS form that assures the attorney-client privilege and gives notice to the government that information has been withheld so the government may seek a judicial order testing the applicability of the attorney-client privilege to the IRS's cash transaction reporting regulations. DR 4-101; CBA Opinions 341; Illinois State Bar Opinions 404, 538, 165, 463; CBA Opinion 71-72-2.

State Bar of Georgia
September 24, 1984
ADVISORY OPINION NO. 41
Client Confidentiality

Pursuant to the provisions of Rule 4-223 of the Rules and Regulations of the Organization and Government of the State Bar of Georgia starting with Rules and Regulations (219 Ga. 873, as amended), the State Disciplinary Board of the State Bar of Georgia, after a proper request of such, rendered its opinion concerning the proper interpretation of the Code of Professional Responsibility of the State Bar of Georgia.

QUESTION PRESENTED

Lawyer X has received cash fees from clients in excess of $10,000 several times in the past three years. All of these fees were for representation in criminal matters. Each time, X has deposited the money in either his operating account or escrow account, when appropriate, and filed a Currency Transaction Report, as required 31 C.F.R. §103.22. Subsequently, X received a telephone inquiry from a revenue agent with the Georgia Department of Revenue inquiring into the source of the funds recorded on the currency transaction report. Lawyer X refused to divulge the names of his clients.

Canon 1 states: "A lawyer should preserve the confidences and secrets of a client." As EC 4-1 explains, the observance of the lawyer's ethical obligation to hold inviolate confidences and secrets of his client encourages laymen to seek legal assistance and facilitates full development of the facts essential to proper representation of the client. EC 4-5 directs that a lawyer should not use secrets acquired in the course of the representation of a client to the disadvantage of

the client. This obligation continues even after the termination of the lawyer's employment. (EC 4-6).

These principles are incorporated in the Directory Rules and Disciplinary Standards. DR 4-101 and Standard 28 prohibit a lawyer from revealing the confidences and secrets of a client. A violation of this Standard is punishable by disbarment. A lawyer may reveal confidences and secrets of a client only (1) if the client consents after full disclosure; (2) where the confidences or secrets are permitted to be disclosed under the Disciplinary Rules or required by law or court order; (3) where the client intends to commit a crime and information is necessary to prevent the crime; or (4) where it is necessary for the lawyer to establish and collect his fee, or defend himself against the accusation of wrongful conduct.

The State of Georgia then issued a Notice to Produce, requiring production of "... all books, records, papers and/or documents pertaining to (Lawyer X's personal Corporate Georgia Income Tax) for the periods indicated [1981-1983]." The Notice to Produce did not name a specific person as a client for an investigation, but Lawyer X was verbally advised by the revenue agent that in fact, the purpose of this Notice to Produce was to discover, at random, the names of the client, and to audit the lawyer.

(1) Will Lawyer X violate the confidences and secrets provision of the Code of Ethics by complying with the Notice to Produce in revealing the identity of the client in those transaction in excess of $10,000?

(2) Additionally, will Lawyer X violate the confidences and secrets provision of the Code of Ethics by complying with the Notice to Produce in revealing the identity of all of his clients and the amount of fees paid,

whether by cash, check, or any amount above or less than $10,000?

OPINION

The applicable ethical rules are Canon 4; EC's 4-1 through 4-6 and Standard 28.

It should be first noted that the questions addressed in this opinion pertain only to a general Notice to Produce seeking information from an attorney's file. The dollar amount involved in the hypothetical is not controlling, rather it is the fact that the Notice to Produce is not addressed to a particular client.

The ethical and disciplinary rules distinguish between "confidences" and "secrets". The former is information protected by the attorney/client privilege as determined by applicable law, and is more limited than the ethical obligation of the lawyer to guard the secrets of his client. A secret, on the other hand, refers to "other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which could be embarrassing or would likely be detrimental to the client." (emphasis supplied) (DR 4-101(a) and Standard 28(c)).

It is the opinion of the State Disciplinary Board that in responding to a general Notice to Produce Lawyer X should not voluntarily reveal the name/identity of his clients to the Georgia Department of Revenue unless he obtains the consent of the client or clients affected after a full disclosure. [Standard 28(b)(1)]. Further, Lawyer X should resist disclosure until a court orders disclosure [Standard 28(b)(2)] and thereafter he should pursue all reasonable avenues of appeal.

This decision finds support in the opinions of at least four other Bar Associations which have issued opinions

concerning a similar, if not identical, factual situation. Briefly stated, these opinions hold that an attorney should resist disclosure of the names/identity of his clients. The District of Columbia, Philadelphia and Birmingham Opinions also suggest that an attorney should utilize all appellate avenues before making disclosure.

Opinion No: 124 of the Committee on Legal Ethics - the District of Columbia Bar Association (March 22, 1983), Opinion No. 81-95 of the Professional Guidance Committee of the Philadelphia Bar Association (undated); Opinion of Professional Ethics of the Birmingham Bar Association (unnumbered) (January 9, 1981), and Informal Opinion No. 81-3 of the Committee on Professional Ethics of the Connecticut Bar Association (October 9, 1990).

NEW YORK STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
January 18, 1990

BE IT RESOLVED, that the New York State Bar Association Criminal Justice Section expresses the deepest concern over the effect upon the attorney-client privilege and upon the confidentiality of the attorney-client relationship of § 6050(I) of the Internal Revenue Code, added by § 146 of Title 1 of the Deficit Reduction Acts of 1984, which requires disclosure of cash receipts in excess of $10,000 dollars; and

BE IT FURTHER RESOLVED, that the New York State Bar Association Criminal Justice Section urges the Department of Justice and the Department of the Treasury to delay enforcement of § 6050(I) with respect to receipt by lawyers cash fees or expenses for legal services until an appropriate solution can be devised; and

BE IT FURTHER RESOLVED, that the New York State Bar Association Criminal Justice Section be authorized and directed to work with the Treasury Department and Internal Revenue Service officials and with appropriate committees of the Congress in an effort to exempt from disclosure requirements, cash fees or expenses received by lawyers for legal services."

N Y S B A

RESOLUTION ADOPTED BY THE NYSBA HOUSE OF DELEGATES

IN OPPOSITION TO ENFORCEMENT OF IRS ECONOMIC PENALTY ASSESSMENTS AGAINST ATTORNEYS UNDER 26 U.S.C. SECTION 6050I

RESOLVED, that the New York State Bar Association opposes enforcement of 26 U.S.C. Section 6050I (Form 8300) through the recent program of IRS economic penalty assessment against attorneys. These penalties should cease until the meaning of "special circumstances" is determined through civil enforcement proceedings brought by the United States Department of Justice, and it is further

RESOLVED, that the New York State Bar Association also urges the IRS and DOJ to consult with the American Bar Association and the National Association of Criminal Defense Lawyers and attempt to develop procedures and regulations that will accommodate the interest of attorneys in complying with the rules of professional responsibility and ethics and the interest of the government in enforcing 26 U.S.C. Section 6050I.

April 16, 1994

NEW YORK STATE BAR ASSOCIATION

Archibald Murray
President

May 4, 1994

Honorable Margaret Richardson
Commissioner
Internal Revenue Service
1111 Constitution Ave., N.W.
Room 3026
Washington, D.C. 20224

Loretta Collins Argrett Esq.
Assistant Attorney General, Tax Division
Department of Justice
10th and Constitution Avenue, N.W.
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Attorney Compliance with 26 USC §6050I

Dear Ms. Richardson and Ms. Argrett

I write as president of the New York State Bar Association concerning a matter of great importance to all practitioners in this state.

In December 1993, the Internal Revenue Service announced a plan to seek significant fines from attorneys who have, on the grounds of attorney client-privilege and ethical rulings, withheld from IRS certain information called for in 26 USC §6050I, which concerns reporting of cash transactions. Specifically, attorneys have withheld information identifying their clients under circumstances where they believed that they were legally and ethically bound to do so.

I have since learned that the IRS has in fact been imposing those fines. This practice poses a significant threat to the ability of attorneys to practice their profession honorably and ethically in the state of New York. It will be particularly difficult for small law offices to continue to practice criminal law.

I believe that attorneys are caught between ethics rules and the IRS policy of enforcement. Until such time as a practical procedure can be worked out for a means of vindicating client rights and attorney obligations in the face of 6050I, I believe that the IRS policy is both counterproductive and may cause significant hardship both to practitioners and to persons in need of legal services.

For these reasons, I reiterate personally the resolutions adopted unanimously by the House of Delegates on April 16, 1994, a copy of which I enclose. There, we urge an orderly approach to determination of the circumstances under which attorneys may or must decline to provide the information.

Thank you very much for your consideration of this matter. I am taking the liberty of forwarding copies of this letter to other officials who are particularly concerned with this matter.

Very truly yours,

/s/ Archibald Murray
Archibald Murray
President

cc: David Jordan, Esq.
Acting Chief Counsel
Internal Revenue Service

Hon. Alfonse D'Amato
United States Senate

Hon. Daniel F. Moyrihan
United States Senate

Hon. Michael Kopetski
United States House of Representatives

Hon. Charles B. Rangel
United States House of Representatives

State Bar of New Mexico Advisory Opinions Committee
Advisory Opinion 1989-2
December 11, 1989

ATTORNEY'S DUTY TO REPORT CASH TRANSACTIONS OVER $10,000 MADE WITH A CLIENT

Attorney's client has been indicted for violation of the controlled substances laws. Client retained attorney to represent him in this case and paid attorney a fee in excess of $10,000 in cash. Federal law requires attorney to report this transaction. 26 U.S.C. § 6050I provides that, "(a) . . . Any person - (1) who is engaged in a trade or business, and (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions), shall make the return described . . . (below) . . . (b) . . . A return is described in this subsection if such return . . . (2) contains - (A) the name, address, and TIN of the person from whom the cash was received, ..." Thus, the law requires the return to include the client's identity. Attorney questions whether the report would violate rules regarding client confidence and fears that disclosure would result in undesirable consequences for attorney and client.

Such dilemma is applicable not only to criminal defense lawyers but also to civil lawyers in a variety of situations. Compliance with the law in all these situations could lead to undesirable consequences such as: inquiry or prosecution by taxation authorities; attorney being subpoenaed to give testimony adverse to client regarding client's possession of the cash; or seizure of the fee paid as proceeds of a criminal transaction.

It is the intent of Congress under 26 U.S.C. § 6050I that an attorney who receives $10,000 or more in cash from a client must report the receipt and the client's identity to the Internal Revenue Service. This law provides no recognition of client confidence. Violation of the law is a felony. On the other hand, SCRA 1986, 15-106(A) provides that, "A lawyer shall not reveal information relating to the representation of a client unless the client consents . . . ." It appears the intent of the New Mexico Rules of Professional Conduct is that attorney should not reveal exactly what the federal law requires attorney to reveal. Thus, there is a conflict between 16 U.S.C. § 6050I and Rule 16-106(A). Our Committee does not resolve the conflict, but we give guidance to New Mexico attorneys encountering it.

Our guidance begins with the premise that it is the duty of a competent attorney to be aware of the law. At the moment the attorney knows that the client contemplates a reportable cash transaction before accepting the cash, the attorney has a duty created by SCRA 1986, 16-101 and -102 to advise the client about these apparently conflicting laws. Following compliance with this advisory duty, there are four possible scenarios:

1. Client will complete the cash transaction and attorney will report with client's consent.

2. Client will decline to complete the transaction and withdraw from or terminate the relationship.

3. Client will complete the transaction in a form which creates no duty to report.

4. Client will demand that attorney accept the cash and comply with the professional conduct rule by not reporting the transaction.

If the client chooses the fourth scenario, New Mexico law would permit the attorney to decline the representation (SCRA 1986, 16-102(E)), or, if a relationship already exists, to withdraw in view of the apparent conflict and threat of prosecution for both attorney and client (SCRA 1986, 16-116(B)(3) or (6)).

There is another possibility for an attorney whose client chooses the fourth scenario. While no attorney is ethically obligated to pursue it, for the reasons stated later in this opinion, we believe pursuit of it would be consistent with the highest ideals of the profession. Since we have identified a conflict between the New Mexico ethical rules and the federal law, an attorney may with the client's consent, agree to "make a good faith effort to determine the validity, scope, meaning or application" of the law at issue. See SCRA 1986, 16-102(b).

While we do not identify any one precise form of such a challenge, we refer to Chicago Bar Association Professional Responsibility Committee, Opinion 86-2, May 11, 1988, as a possible choice. The opinion suggests a notice to the IRS on the required reporting form that the identity of the payor has been withheld because of a claim of client confidence. This method would put the government on notice of the attorney's "good faith effort" and allow the government to seek judicial relief testing the claim of ethical obligation.

Prior to accepting the cash and filing such a notice or choosing any other particular "good faith effort," the client must be advised of the nature of the effort and given the

opportunity to reconsider the choice of scenario. Such advice should include the possibility that attorney will ultimately be compelled to reveal the client's identity. Such advice should also include the warning that attorney and client may be subject to prosecution for violation of 26 U.S.C. § 6050I.

While New Mexico attorneys are not required to make this good faith effort, the Committee notes that one commentator suggests the very purpose of laws such as 26 U.S.C. § 6050I is to drive a wedge between lawyer and client with the end result that persons accused of drug offenses will be weakened in their ability to defend themselves. S. Wisetsky, Crackdown: The Emerging "Drug Exception" to the Bill of Rights, 38 Hastings L. J. 383 at 900-904 (1987). The Committee further notes that, throughout the former Code of Professional Responsibility and the current Rules of Professional Conduct, there are provisions requiring a lawyer to be mindful of his obligations to provide legal assistance to those who need it. Former Canon 2 and EC 2-1; SCRA 1986; 16-6-1, -602. Thus, the Committee is of the opinion that an attorney who chooses not to decline the representation and who rather chooses to represent the client while challenging the law would uphold the highest ideals and traditions of our profession.

The above discussion reflects the consensus of all members of the Advisory Opinions Committee. This opinion does not address the dilemma facing an attorney who did not discuss 26 U.S.C. Section 6050I with the client until after accepting more than $10,000 in cash and whose client then refuses to consent to any type of disclosure. As to this question, the Committee was divided. A number of Committee members felt that an attorney in this situation was prohibited by client confidence rules from filing any sort of informational return lest the client's identity be ultimately

required to be disclosed. A like number of Committee members were of the opinion that an informational return omitting the client's identity was required as a compromise between client confidence rules and the attorney's duty to abstain from criminal acts reflecting adversely on the attorney's fitness as a lawyer.

OPINION NO. 87-3
January 27, 1987

FACTS:

The inquiring attorney received fees from a client in the form of a cash payment in excess of $10,000.00. Payment was made to the attorney for legal services rendered in conjunction with the defense to a charge that the client had conspired and attempted to evade federal income taxes. Section 6050I of the Internal Revenue Code (16 U.S.C. §6050I) requires that all transactions in which more than $10,000.00 in cash is received in the course of trade or business must be reported to the I.R.S. The inquiring attorney is concerned that "disclosure of the $10,000.00 to the I.R.S. would, in attorney's opinion, violate his client's right against self-incrimination, Fifth Amendment, U.S. Constitution, for reason that I.R.S. would know of monies in hand of client which were not reported on income tax returns." The inquiring attorney is also of the opinion that disclosure would violate the attorney-client privilege.

QUESTION:

Would an attorney, under the above-described circumstances, violate his ethical obligations to his client by filling out and filing the required I.R.S. form?

ETHICAL RULE INVOLVED:

E.R. 1.6. Confidentiality of Information

OPINION:

The subject matter of this opinion was previously governed by Disciplinary Rule 4-101 of the former Code of

Professional Responsibility, and has been discussed in our prior Opinions Nos. 121, 259, 285, 71-5, 71-11, 73-2, 73-25, 74-29, 81-22 and 65-4.

The problem facing the inquiring lawyer was succinctly stated in our Opinion No. 79-4 as follows:

> The duty of an attorney to preserve the confidences of his client . . . is one of the fundamental principles underlying the relationship between an attorney and his client. Under certain circumstances, this role of the attorney appears to be in apparent conflict with another fundamental ethical obligation: The duty of a lawyer as an officer of the court, to uphold the integrity and competence of the legal profession and the system of justice.

Before proceeding with a discussion of the issue at hand, it is important to delineate exactly what it is we are considering and what we are not considering. This committee is permitted only to deal with ethical questions presented by the fact situation submitted by the inquiring attorney. Questions of law presented thereby--- such as whether, on the facts submitted, there exists an attorney-client evidentiary privilege at common law or under statute and the extent of the attorney's duties thereunder are outside the jurisdiction of this Committee. See, our Opinions Nos. 121, 205, 71-5, 73-2, 74-29, 85-4).[1]

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[1] See also the Preamble to the Rules, "Scope": ". . . . [T]hese rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege."

Of course, this discussion is governed by the Rules of Professional Conduct which were adopted by the Supreme Court of Arizona on September 7, 1984, effective February 1, 1985. The Rules superseded the Code of Professional Responsibility which had previously been in effect since November 1, 1970. Although there are some significant differences in the provisions of the "Rules" vis-a-vis the "Code", among them being the scope of confidential communications under ER 1.6, there are no material differences between the "Rules" and the "Code" relating to the issue under consideration, and, therefore, relevant opinions decided under the "Code" are given great weight.

Code provision DR 4-101 listed certain circumstances under which a lawyer was permitted to reveal confidential information that was otherwise not to be disclosed. Subsection (C)(2) thereof permitted an attorney to reveal "confidences or secrets when permitted under Disciplinary Rules or required by law or court order." That this provision is consistent with the intent of the present "Rules" is revealed by the following quotation from the Preamble thereto: "A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law." (emphasis added) Similarly, the Comment to ER 1.6 states: "A lawyer may not disclose such (confidential) information except as authorized or required by the Rules of Professional Conduct or other law." (emphasis added)

For the purpose of this Opinion we will presume that the disclosure of the information about which the inquiring attorney is concerned is required by law. (See 26 U.S.C. §6050I; see also 31 U.S.C. §§5311 et seq.) On this basis, it seems clear that there is no ethical impropriety barring the disclosure of the fee information. However, it must be

emphasized that the terms of DR 4-101(C)(2) are permissive. As is made clear by the terms of the provision and the opinions construing it, just because it is not ethically improper to reveal the information, the attorney is by no means ethically required to do so. And, as noted below, other local considerations may intervene to limit such disclosure.

The comments of the American Bar Association Committee on Professional Ethics in its Informal Opinion 1141 construing DR 4-101(C) (quoted by this Committee in its Opinion No. 71-5 at p. 9), may provide the inquiring attorney with some insight into the nature of his obligations:

> . . . [I]f the attorney is required by law to make a disclosure, . . . the ethics rules are drafted in such a way as to remove any ethical bar to disclosure or to reporting and the only relevant consideration would the application of legal rules. Included among these, of course, are the legal rules relative to the attorney-client privilege . . . .

In the same vein, this committee in its Opinion No. 71-5, at pp. 12-13, stated:

> "We are of the opinion that, if required to do so by 'law or court order,' the inquiring attorney may, with ethical propriety, divulge to the court . . . the information . . . although such information appears clearly to be a 'secret' as defined in DR 4-101(A), and may be a 'confidence,' as there defined, (thus presenting a question of law). We emphasize that our ruling pertains only to the ethical aspects of the problem presented -- the resolution of questions of law involved in the problem being outside our

> jurisdiction -- and that the inquiring attorney, despite our ruling, would seem to be obligated to give careful consideration to his legal duty in the premises in the light of common law and statutory rules governing privileged communication between attorney and client and in the light of A.R.S. §32-263(5)." (emphasis in original)

The comment to ER 1.6 addresses this issue as well. It states:

> In addition to these provisions (ER 2.2, 2.3, 3.3 and 4.1), a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes ER 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession (sic).

It should also be noted that, if the inquiring attorney decides that he is ethically obligated to disclose the information by filing the required I.R.S. form, "he would clearly be ethically obligated to inform his client of this development . . ." (See Opinion No. 71-5, p. 13)

An exception to the general rule prohibiting disclosure by an attorney of confidential information exists where disclosure is required by law. In such situations, the attorney may, within the bounds of ethical propriety, reveal the sought-after information. Whether or not the attorney is prohibited from disclosing the information by some other legal principle is an issue which cannot be decided by this committee. That question must ultimately be resolved by the attorney himself.

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FORMAL 7/6/90

Opinion No. 89-141

A question has arisen which appears to present a conflict between the requirements of client confidentiality and the demands of Internal Revenue Service.

Under Section 6050I of the Internal Revenue Code as amended in 1984 any person who is engaged in a trade or business must report to Internal Revenue Service any receipt in cash or related receipts in cash of over $10,000.00 This is an extension of a law which has long applied to banks. It is quite clear from the Internal Revenue Service regulations at Reg. Section 1.6050 I - 1(a)(3)(iii) and Section 1.6050 I - 1(C)(3)(iii) that Internal Revenue Service construes the term, "trade or business", as applying to lawyers. The report is made on a Form 8300 and must be filed within fifteen days of the transaction. A law firm in the western part of Pennsylvania has received a letter sent by certified mail from a District Director of Internal Revenue calling its attention to this requirement, and since it was a form letter, it seems evident that similar letters to others must have been sent out as well.

Two typical kinds of transactions involving cash of over ten thousand dollars readily come to mind: (1) a deposit or a final payment for the purchase of real estate for a client who for some reason does not trust banks; and (2) the payment of a fee or on account of a fee by a client charged with a criminal offense. Both of these types of transactions, incidentally, are referred to in examples under the portions of the Internal Revenue Service regulations cited above.

The answer to this question involves not only an analysis of the Rules of Professional Conduct, but also involves analysis of other areas of law including both the federal tax law and the United States Constitution. The committee professes expertise in the ethics area, but must leave the individual lawyer to his or her own research outside the ethics field. We have conducted some research, however, in these outside areas, and have some passing thoughts and furnish them here in order to provide a starting basis for any lawyer desiring to inquire further into the matter.

We turn first to the Pennsylvania Rules of Professional Conduct. The governing words of the general rule of confidentiality are found at Rule 1.6(a) of the Supreme Court of Pennsylvania's Rules of Professional Conduct and are as follows:

> "(a) A lawyer shall not reveal information relating to representation of a client ...."

Then follow six exceptions to the rule which are not applicable here.

It has long been recognized that, separate and apart from the general rule regarding confidentiality, is the situation regarding testimony by the lawyer concerned in court. That situation is governed by the law of evidence rather than by an express provision in the Rules of Professional Conduct. There is a cross-reference to it in the comment under the fifth paragraph following Rule 1.6 and also under the later heading, "Disclosures Otherwise Required or Authorized." One distinction which come to mind is that the one set of principles is governed by rules of the Supreme Court and the other by statutes passed by the legislature. The evidentiary rule would not appear to come into play, however, unless the lawyer were to refuse and pursue his refusal until the process reached a hearing in Court. A lawyer seeking to make an immediate decision would not be helped very much by it.

> What of an Act of Congress? Where does it fit in?

The comment under Rule 1.6 referred to one other situation. It recognizes that there may be a situation where "other law" might give rise to a further exception. In the fifth paragraph of the comment, after discussing the court testimony situation, it states:

> "A lawyer, may not disclose such information except as authorized...by...other law."

Again under the subheading, "Disclosures Otherwise Required or Authorized", the comment states:

> "In addition...a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a

> matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession."

Care should be taken in reliance on material contained in the comments. Both in the adopting order and in the Preamble to the Rules it is stated that the comments are not part of the Rules of Professional Conduct. In the preamble it is stated:

> "The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each Rule is authoritative."

The committee believes, however, that, in the absence of any indication in the rule itself, attention ought to be paid to the comment. It believes that the conflict of other law is a second unwritten exception (unwritten so far as the rules themselves are concerned) to Rule 1.6 along with the attorney-client privilege principle, an exception which is well recognized.

This is as far as our opinion can go. As stated above, the material which follows is presented only with the thought that it may be of help to the individual lawyer desiring to pursue the subject further.

First, in attempting to interpret the Internal Revenue Code, it appears that not much help can be gained from the Congressional committee reports as to whether lawyers were meant to be included when the 1984 amendment was being considered. The expansion of the section to include trades and businesses apparently came from the Senate Finance Committee. No mention of whether the phrase was meant to include lawyers appears in the Explanation of the Senate

Finance Committee issued April 2, 1984, CCH Standard Federal Reports, Special Report dated April 5, 1984, pp. 439-441; the Conference Committee Report, 1984-3 C.B. pp. 241-243; or the General Explanation of the Tax Reform Act of 1984, prepared by Staff of the Joint Committee on Taxation, CCH Standard Federal Reports, Special Report dated January 3, 1985, pp. 491-492.

The phrase, "trade or business" is also used in other portions of the Internal Revenue Code. A "profession" is included according to an editorial comment at 892 CCH 1332.1075. The Code itself has a definition section, and "trade or business" is included at Section 7701(a)(26), but the definition given there is not particularly informative. It states merely that the performance of the functions of a public office are included in the term; however, that definition tends to show that a broad interpretation is intended.

It also would appear that Internal Revenue Service is given a broad scope by Congress in adopting regulations.

While the section of law concerned is part of the law dealing with the gathering of revenue and is ostensibly in aid of identifying persons who have failed to report income, it obviously serves also the purpose of identifying possible traffickers in drugs and perhaps, participants in other unlawful activities.

Secondly, a federal constitutional provision comes into play; namely, the Sixth Amendment, protecting the right to retain counsel of one's choosing. Two recent United States Supreme Court cases, however, would appear to narrow the applicability of that amendment and should be studied. They are U.S. v. Monsanto, 491 U.S. - , 105 L.Ed.2d 572 (1989) and Caplin and Drysdale v. U.S., 491

U.S. - , 105 L.Ed.2d 528 (1989), which dealt with the potential forfeiture of assets derived from drug operations and their availability to pay counsel in defense of the charges. In each case the attorneys were prohibited from retaining the fees paid from such assets. The effect of these two decisions on the interpretation of the Sixth Amendment in the opinion of Justice Blackman was highlighted in his dissenting opinion in the Caplin and Drysdale case, in which three other justices joined.

A serious concern involving the Sixth Amendment is that the lawyer receiving the cash and reporting it to the Government may find himself subpoenaed to testify with regard to it, perhaps before a grand jury, at a criminal trial, or in a civil forfeiture proceeding. Not only would his or her doing so be damaging to the attorney-client relationship, but it could lead to the disqualification of counsel. It can be argued that this amounts to deprivation of counsel of one's choice.

The question may also be viewed as one of the power of the Congress to regulate the currency. In the early 1930's Congress devalued the dollar, defining it as having the value of $35.00 an ounce of gold instead of $20.67 an ounce. It was quite common for both private and government bonds to contain clauses permitting the bondholder to demand payment in gold of a certain weight and fineness instead of money in order to protect against exactly the sort of action the government took. In Norman v. B. & O. R. R., 79 L.Ed. 885 (1935), The Supreme Court struck down such a clause in a private bond issue in spite of the prohibition in the Constitution against impairment of contracts, and in Perry v. U.S., 79 L.Ed. 912 (1935), it did so in the case of a bond issue of the United States itself. The power of Congress to control the currency would appear to be a far reaching one.

There is the further question, to what extent a federal law can contradict a state one. There are many examples of this sort of conflict, with divergent results, but we have made no attempt to research this area.

The American Bar Association at the meeting of its House of Delegates on February 18th and 29th, 1985, sought to counter any position which would include lawyers within the scope of Section 6050 I. Pursuant to the resolution which it adopted, E. E. Edwards, Esq., as Chairperson of the Defense Function Committee of the Criminal Justice Section, appeared before the Senate Finance Committee on June 5, 1985, to request an amendment exempting attorneys from the scope of the section. He also appeared on September 19, 1985, as a member of the Council of the Criminal Justice Section before the Internal Revenue Service to request that regulations implementing Section 6050 I be delayed until a compromise could be reached involving the Treasury Department and the appropriate committees of Congress, under which lawyers would be obliged to report the receipt of cash but not have to identify the source of such cash. Nothing seems to have come from these efforts. An observation might be made that the American Bar Association resolution seems to assume that the section as written does in fact cover lawyers, but this might be reading too much into the position the House of Delegates chose to adopt.

There are six previously published opinions on this question of which we are aware. One is contained in an article in the Illinois Bar Journal, June, 1989, pp. 530 et seq., by Peter J. Berman, Esquire. It relies heavily on the analogy of attorney-client privilege, but also deals with the "required by law" phrase which appears in the black letter disciplinary rule, D.R. 4.101(c)(2), apparently still in effect in Illinois. In Mr. Berman's opinion there are some

circumstances in which the lawyer ought not to be required to disclose the information requested. See also Price vs. Wirtz, 412 F.2d 647 (CA-5, 1966) referred to in the above article.

Also coming out of Illinois is an opinion of the Chicago Bar Association Professional Responsibility Committee, Opinion 86-2, dated May 5, 1982, reported in the ABA/BNA Lawyers' Manual on Professional Conduct, Vol 4., No. 12, July 6, 1988. That committee's position was that completion of the IRS form was a violation of the Illinois confidentiality rule, DR 4-101, and that the lawyer should notify the Internal Revenue Service that such was his position and that he would seek a judicial order testing the assertion of his position.

The third opinion is one of the New Mexico Ethics Committee, which is reported in the ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 5, No. 27, January 31, 1990. Its position is that before accepting the money, the lawyer should advise the client that he or she is obliged to disclose the service. It gives an alternative that the lawyer may either withdraw from the representation or file a report omitting the client's name as a challenge to the statute.

The fourth opinion is one of the State Bar of Wisconsin Professional Ethics Committee, E-90-3. It advises the lawyer to consult with the client regarding the Form 8300, but declined to advise on whether the lawyer is in violation of the law, if he or she files an incomplete Form 8300.

There are members of the criminal defense bar who believe strongly that the rule of confidentiality should prevail over the IRS position. Formal Opinion 89-1 of the Ethics Advisory Committee of the National Association of Criminal

Defense Lawyers reported in ABA/BNA Lawyers Manual on Professional Conduct, Vol 6, No. 10, June 20, 1990, reflects this thinking. It advises that the lawyer should assert the confidentiality privilege by filing the Form 8300 without identification of the client, but with a statement as to the reasons for the omission, and continue to refuse disclosure unless or until required to do so by a court. It further advises the lawyer at the outset to inform the client that ultimately the identity might have to be disclosed. It contains no analysis of whether the lawyer might face penalties for the mere failure to disclose on the form, regardless of any further proceedings.

Another opinion favoring strongly the viewpoint that confidentiality obtains is that of the Ohio Supreme Court Board of Commissioners on Grievances and Discipline, Opinion 90-4, April 20, 1990, reported on the same page as the opinion cited in the paragraph above. It advises flatly that when disclosure of the client's identity would jeopardize the client, his identity ought not to be disclosed. It adds, however, that the lawyer should advise the client that federal law might ultimately compel such disclosure.

At least one member of the Committee would have us make a strong statement in support of the confidentiality principle overriding the Act of Congress. Another expresses the opinion that Congress must not have realized the impact that the act would have on lawyer-client confidentiality that therefore the act may well be interpreted to carve out an exception where the information would have an adverse impact upon a client. Another feels that the law should be viewed as a law to help the collection of income taxes and that we should realize the strength the courts have accorded the income tax law. At least one member of the Committee fully anticipates that, if the issue is presented to the Supreme Court of the United States, the Internal Revenue Service will prevail.

While this opinion was in the course of consideration by the Committee, there have been several federal court opinions. See U. S. Fischetti et al., M 18-304 (U. S. Dist. Ct. So. Dist. of N.Y., 1990) and Rabin v. U.S., 88-5056 (U. S. Ct. App., 11th Circuit, 1990). An opinion is being awaited in the 10th Circuit.

It seems possible that the issue will reach the United States Supreme Court. In the meantime the attorney who is offered more than $10,000 in cash should realize that he (or she) may be in violation of federal law (or alternatively of the Rules of Professional Conduct), if he accepts the cash without the consent of the client involved to disclose the transaction. In such cases he is placed in a dangerous dilemma.

Footnote: Section 6050 I (a) reads as follows:

"(a) CASH RECEIPTS OF MORE THAN $10,000 - Any person -

(1) who is engaged in a trade or business, and

(2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 1 or more related transactions)

shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulation prescribe."

Caveat: This is not an official opinion of The Disciplinary Board of the Supreme Court of Pennsylvania, and any opinion rendered will be afforded only as much weight as the reviewing authority may choose to give it.

E-90-3 Disclosure of client identity to IRS

Question

Should a lawyer disclose to the Internal Revenue Service, as required by 26 U.S.C. section 6050I, Form 8300, Information revealing the identity of a client who pays a cash fee in excess of $10,000?

Opinion

A lawyer shall not disclose the identity of a client or information concerning fees paid without the informed consent of the client. SCR 20: 1.6(a) and Wis. Stat. section 905.03 (1987-88). Before accepting a fee of more than $10,000 in cash from a client, a lawyer should consult with the client regarding the lawyer's duties under 26 U.S.C. section 6050I(b)(2) to file a Form 8300 and the risks and implications of omitting the information requested on that form. SCR 20: 1.4(b).

It is professional misconduct under SCR 20: 1.4(b) to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Under SCR 20: 1.2(d), it is professional misconduct for a lawyer to "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent ...." This committees expresses no opinion on whether it would be a violation of law for a lawyer to file an incomplete IRS Form 8300.

Further, to provide Wisconsin lawyers more detailed guidance on these issues, we find the following portion of Formal Opinion 89-1 of the Ethics Advisory Committee of

the National Association of Criminal Defense Lawyers informative:

"The committee believes that unless the attorney-client, Fifth and Sixth amendment privileges are clearly inapplicable under prevailing law, the attorney should assert those privileges and decline to disclose information relating to fees received from a client."

RPC Rule 1.6(a) [SCR 20:1.6(a)] and CPR DR 4-101(c)(1) require that the lawyer consult with the client before any disclosure of a client matter, confidence or secret. Therefore, if a client proposes to pay a lawyer more than $10,000 in cash for a fee, the lawyer is obligated to advise the client that the lawyer may have a duty under 26 U.S.C. section 6050I(b)(1) to file a Form 8300 which discloses:

(A) the name, address and TIN of the person from whom the cash was received;

(B) the amount of cash received;

(C) the date and nature of the transaction.

The lawyer should advise the client that reporting the client's identity in this cash transaction might create a risk that the client could be investigated by the federal government. The lawyer should discuss with the client whether each disclosure might in some manner incriminate the client for some past wrongdoing, whether it be the matter for which the client has retained the lawyer or another matter. Criminal defense attorneys should be careful not to say anything that might be considered as advice as to how to circumvent the reporting requirement by 'structuring.' *See* 26 U.S.C. § 6050I (F1)(3)(c), 31 U.S.C. 5322. Further, they are cautioned that acceptance of fees that are known by them

to be the proceeds of certain crimes may be considered a criminal offense under 18 U.S.C. sections 1956, 1957, 2113(c) and 2315. The client must, at the minimum, be informed of the risks of investigation or prosecution which could derive from disclosure of the client's identity and the fee information; that the lawyer must, under the law, file the requested form, even if he or she omits the client's identity, and that, although he or she will resist the government's efforts to secure such information, the lawyer may ultimately be compelled by a court to disclose the information required on the Form 8300.

Since no court of last resort has yet ruled on these specific issues, the lawyer should be careful not to intimate to the client that the information will remain forever privileged.

The client should then make the decision, after full consultation with the lawyer, whether his or her identity should be disclosed on the Form 8300. If the client cannot be consulted when the money is received by the lawyer, the lawyer should decline to disclose the information until he or she has had an opportunity to discuss the matter fully with the client, which the lawyer should attempt to do as soon as possible. It should be explained that the decision whether to refuse to disclose the information sought belongs to the client.

If the client determines that his or her identity should not be disclosed on the Form 8300, the lawyer has a duty not to disclose those facts. Thus, the Form 8300 must still be filed, but the lawyer should insert in the form in place of the client's name, address and tax identification number a statement that the lawyer and the client are asserting client confidentiality, the attorney-client privilege and, if applicable, the Fifth and Sixth amendment privileges, and not

disclose the information. Lawyers are presumed to have the authority to do so under the Uniform Rule of Evidence 502(c), and they must.

The requirements of client confidentiality, of course, do not relieve the lawyer of the statutory duty to file a Form 8300 providing the rest of the information. Also, it is noted that filing a Form 8300 with an assertion of privilege will likely result in the IRS sending a computer-generated letter informing the lawyer that the form filed was incomplete and that the failure to supply the omitted information may result in the IRS initiating an enforcement procedure. The lawyer should not voluntarily disclose the client's identity in response to this letter unless the client consents.

When the letter threatening enforcement is received, the lawyer is still presumed to have the authority to continue to assert confidentiality and evidentiary and constitutional privileges and rights. The lawyer should contact the client and advise the client of the situation. Only when the client consents, however, can an amended form be filed. If the client still refuses to disclose, the lawyer must abide by that decision and decline to voluntarily provide the information to the IRS. If the lawyer cannot reach the client, he or she should similarly decline to provide the information.

It is the committee's opinion that the lawyer's duty to protect against disclosure of client matters or confidences extends to any IRS summons or threat of summons seeking to compel the lawyer to disclose the client's identity. Uniform Rule of Evidence 502(c). Disclosure should not be made unless and until a court, preferably an appellate court, considers the validity of the summons and any judicial enforcement orders in this area and that court's ruling requires such disclosure.

It is the committee's opinion that the lawyer should respond to the letter and state in clear and respectful terms

the nature of the objection to providing the information and the legal bases for it. It is further the committee's recommendation that any enforcement order be appealed to a higher court before the lawyer complies because of the significant unresolved issues involved.

As stated earlier, however, the attorney-client privilege is not as broad as ethical standards of confidentiality. The IRS may seek judicial enforcement of its efforts to get the lawyer to disclose the client's identity. The lawyer should resist this effort to breach confidences, privileges, and rights and require judicial enforcement of any IRS efforts to gain such privileged information. The lawyer should also notify the client and ask if the client wishes the lawyer to contest the enforcement procedure. The lawyer should consider suggesting to the client that he or she might retain separate counsel to seek to intervene and challenge the IRS action. A challenge by the client would generally be feasible only if he or she is allowed by the court to proceed anonymously, Fed.R.Crim.Pro. 24(a)(2), *Gravel v. United States*, 408 U.S. 606, 608 n.1 (1972); *Perlman v. United States*, 247 U.S. 7,13 (1918).

A lawyer may ultimately be judicially compelled to disclose the client's identity. At that point, the lawyer will have to make a personal decision whether to comply with the order, or risk a finding of contempt in order to be able to appeal the order. Generally, a person may not appeal an order to provide evidence without first resisting the order and being found in contempt. *Cobbledick v. United States*, 309 U.S. 323 (1940). Such a "technical contempt designed solely to obtain appellate review of arguable claims is so common that no reputational injury .. will result." *Re Dept. of Investigation of City of New York*, 851 F.2d 65 (2d Cir. 1988), *See Re Kiels*, 776 F.2d 628, 631 (7th Cir. 1985); *Re Attorney General*, 596 F.2d 58 (24 Cir. 1979).

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ETHICS OPINION
NO-86-19

QUESTION

"As per your previous conversation with my law partner, Mr. Joel____ ____, he informed you and I now inform you that I am being audited for the calendar year 1983. As a part of the information requested in the audit, the Internal Revenue Service has requested to see my appointment book for that calendar year along with copies of our trust account book statement and canceled checks for the law firm which was formerly ____ & ____. These canceled checks of course include the transactions of our clients for not only myself but my law partners. My appointment book contains information relative to people who have come to see me and also pertaining to what they came to see me for along with their telephone numbers.

Needless to say, even though revealing this information causes no personal concern to me, it is of concern relative to the confidentiality of the matters requested and I would respectfully request an opinion from your office in regard to the same.

ANSWER

If you make a good faith professional judgment that to allow an inspection of your appointment book for the calendar year along with copies of your trust account bank

statements and canceled checks would reveal certain "confidences" or "secrets" of your clients, you should respectfully refuse to produce these documents and assert that they are protected by the attorney-client privilege. However, should a court order be obtained directing you to produce these documents you may do so without violating the Code of Professional Responsibility since DR 4-101 (C) (4) provides that an attorney "may" first avail himself of all appellate remedies when required by a tribunal to make disclosures but does not require that the attorney do so.

DISCUSSION

Disciplinary Rule 4-101 (A) provides:

> "(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Disciplinary Rule 4-101(B)(1) provides:

> "(B) Except as permitted by DR 4 101(C) lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client."

Disciplinary Rule 4-101(C)(4) provides:

> (C) A lawyer may reveal:

* * *

(4) Confidences or secrets when required by law, provided that a lawyer required by a tribunal to make such a disclosure may first avail himself of all appellate remedies available to him."

The Code of Professional Responsibility and the opinions of courts and ethics committees offer little guidance as to precisely what is included as a "confidence" or "secret" as those words are used in DR 4-101(A). In the case of Ex Parte Griffin, 278 Ala. 344, 178 So. 2d 659 (1965), the Supreme Court of Alabama enumerated certain matters which are not protected by the attorney-client privilege. In the opinion the Court observed:

* * *

"...communications made by a client to an attorney which the attorney in the discharge of his duty is of necessity obliged to make public are not privileged. See White v. State, 88 Ala. 69, 5 So. 674. This rule is applicable to facts communicated by a client which are to be allowed in pleading, Thorneen, supra, Sec. 118, 58 Am. Cir. Witnesses, 491.

In addition to the above doctrines it was specifically held in White v. State, supra, that an attorney may, without violating the rule of confidential communications, be compelled to testify to the fact of his employment that he was the authorized attorney of a client in a certain transaction; as to any matter manifestly not intended to be private or confidential, but was intended to be communicated to the adverse party; to prove the handwriting of his client, the

payment of monies to him, the execution of papers which the attorney attested.

Strangely, our research reveals no opinions of courts or ethics committees dealing with a fact situation identical or closely analogous to yours. The American Bar Association Committee on Ethics and Professional Responsibility in Informal Opinion 1411 (1978) held that there would be no violation of the provisions of Canon 4 of the Code of Professional Responsibility for a lawyer to furnish information required by the United States Census Bureau regarding the lawyer's income and source of his fees (not by client name but rather by broad categories), the opinion stated:

* * *

"We have examined the copy of the form furnished to you. We do not believe that the completion of the form by an attorney would violate the Code since the information requested would not reveal confidences or secrets of clients."

* * *

It should be noted that the opinion emphasized the fact that clients' names were not revealed.

Although dealing with fact situations different from that posed in your request for opinion, the Office of General Counsel and the Disciplinary Commission have on numerous occasions held that where an attorney is requested to reveal a "confidence" or "secret" of a client he must respectfully decline to do so and assert the attorney-client privilege. However, in each of these opinions it was held that where a

court order directed the attorney to reveal such "confidence" or "secret" the attorney would not be in violation of the Code of Professional Responsibility should he do so since ER 4-101(C) (4) states that an attorney "may" first avail himself of all appellate remedies available to him but does not require him to do so.

In conclusion, we are of the opinion that if you are of the opinion that an inspection of the documents described in your request for opinion would reveal "confidences" or "secrets" of your clients that you should respectfully assert the attorney-client privilege, but if ordered to produce these documents you can do so without being in violation of the Code of Professional Responsibility.

3-20-86

Kentucky Legal Ethics

Opinion ERA E-253

Question 1: May a lawyer reveal the names and addresses of clients?

Answer 1: Qualified yes.

Question 2: May a lawyer reveal the credit listing of clients?

Answer 2: Qualified yes.

References: Canon 4: E 4-2; DR 4-101(C); ABA Opinion 320; ABA Informal Opinion 1200; Hughes v. Meade 463 SW.2d 535 (Ky 1970)

Opinion (September 1981)

The point of departure for an examination of the questions presented must be Canon 4 of the Canon of Legal Ethics. This Canon provides that, "A lawyer should preserve the confidences and secrets of a client." We must then determine whether the phrase "confidences and secrets of a client" is limited only to those things directly related to the subject of the client's case or whether it also extends to the very existence of the attorney/client relationship and the financial circumstances of that relationship.

Obviously, there are certain attorney/client relationships which, by their very nature are exposed to public knowledge. Those relationships include, inter alia, most litigation and real estate work. In these areas it is usual that the attorney's work product is signed and placed in the

Equally obviously, there are other attorney/client relationships where the client certainly expects confidentiality as to even the existence of the attorney/client relationship. These relationships include estate planning, advice about potential criminal liability for an action a client has taken, or consultations about possible bankruptcies or divorces.

In the latter circumstances if the attorney were to ask the client whether he expected the fact of his employment of the attorney to be kept confidential, it can be safely assumed that virtually all would say yes.

The client's expectations are extremely important. The practice of law is a profession. A professional must be sensitive to a client's expectation not just "from the standpoint of good business", but also from the standpoint of ethical obligations.

Ethical Consideration 4-2 says (in part), that,

> A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship.

We believe that a proper application of the phrase "confidences and secrets of a client" includes any information about the attorney/client relationship, including its very existence (unless, of course, the representation of the client's interest requires it). We must then examine the question of whether the disclosure of confidences and secrets can be permitted by a client's waiver.

Disciplinary Rule 4-101(C), provides that,

> A lawyer may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after